THIS

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

DURING

MICHAELMAS AND HILARY TERMS, TENTH GEO. IV.

AND

EASTER TERM, ELEVENTH GEO. IV.

BY

JAMES MANNING, Esq. of Lincoln's Inn,

AND

ARCHER RYLAND, Esq. of Gray's Inn,

BARRISTERS AT LAW.

VOL. V.

WITH AN INDEX

AND

TABLE OF PRINCIPAL MATTERS.

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JUDGES

OF THE

COURT OF KING'S BENCH,

During the period comprised in this volume.

CHARLES Lord TENTERDEN, C. J.
Sir JOHN BAYLEY, Knt.
Sir JOSEPH LITTLEDALE, Knt.
Sir JAMES PARKE, Knt.

ATTORNEY-GENERAL.

Sir JAMES SCARLETT, Knt.

SOLICITOR-GENERAL.

Sir EDWARD BURTENSHAW SUGDEN, Knt.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

MICHAELMAS TERM,

IN THE TENTH YEAR OF THE REIGN OF GEORGE IV.

PLAXTON *v.* DARE, Esq. and another.

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TRESPASS. Declaration stated that defendants, on 19th August, 1828, and on divers, &c., with force and arms broke and entered a certain stable of plaintiff, situate, &c., and then and there seized and took one mare and one halter of plaintiff, of great value, &c., and kept and detained the same for a long space of time, and until the plaintiff was forced and obliged to pay a certain sum of money, to wit, 2*l.* 16*s.* in order to regain the possession of the mare and halter. Second count, for an asportation generally. Plea, not guilty. At the trial before *Gaselee*, J. at the last Chelmsford Assizes (*a*) the following facts appeared:—The mare and halter mentioned in the declaration were taken

The muniment chest of the lessor and his assigns is the proper custody for an expired lease.

Expired leases and counterparts of expired leases, though cancelled, are admissible in evidence upon a question of boundary.

Old assessments to church rate are evidence upon a question of boundary, though the parish officers do not charge themselves with the receipt of the rate, otherwise than by crosses set against the names of the parties rated.

(*a*) Counsel for the plaintiff, *Spankie*, Serjt. and *Barnewall*; for the defendants, *Gurney*, *Brodrick*, and *Chitty*.

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under a warrant of distress issued by the two defendants, who were magistrates of the county of Essex, against the plaintiff, for the non-payment of 2*l.* 8*s.*, for which he was assessed towards the relief of the poor of the parish of West Ham, as inhabitant and occupier of a piece of land in that parish. The plaintiff, a farmer, residing at Leyton, in Essex, was the occupier of a farm called Canhall Farm, and other lands, partly situate in the parishes of Wanstead and Leyton, and partly in the parish of West Ham. The plaintiff paid the sums at which he was rated for two closes in West Ham, but disputed his liability in respect of eight acres, part of Great Ashfield, which he alleged was in the parish of Wanstead. In proof of this the plaintiff produced a lease of the close in question, dated 26th of November, 1646, from *Richard Boothby* to *Thomas Mortimer*. This lease was produced from the muniment chest of Major *Colgrave*, the present owner of Ashfield, in which Ashfield is described as being in the parish of Wanstead. On the behalf of the defendants it was objected that the lease, coming from the possession of Major *Colgrave*, who was entitled only to the possession of the counterpart, was inadmissible; and that supposing this to be the proper custody, the lease, though admissible as proof of title, could not be used upon a question of locality, &c.; 1 *Starkie on Evidence*, 326; 1 *Phillipps on Evidence*, 7th edit. 250, were cited. The learned judge received the evidence but reserved the point. Another lease of 19th of March, 1712, from *Wm. Colgrave* to *James Hutton*, and another of 1760, from *Wm. Colgrave* to *Edward Harvey*, were put in. These two leases appeared to be cancelled. The church rates for 1737 and 1740 were then put in, and were admitted in evidence by the learned judge. The plaintiff then tendered a book produced from the parish chest, purporting to be a copy of the parish accounts, of the receipts and disbursements from 1712 to 1746. This being objected to, Mr. Serjeant *Spankie* insisted that this was a book of a public nature, and sufficient to charge the parish officers. The learned

judge rejected this evidence, but took a note of its being offered. The assessment to the poor rate for 1740 was put in. This contained no statement that the rates therein mentioned had been paid, otherwise than by containing crosses set opposite to certain names in the book. The learned judge said that he would receive the evidence, but that unless some proof of payment were given he should tell the jury to pay no attention to it. A great deal of other evidence was gone into on both sides. The jury having found a verdict for the plaintiff,

Gurney now moved to set it aside. Neither the lease of 1646, nor the cancelled leases of 1712 and 1760, nor the rates, were admissible in evidence against the defendants. [*Bayley*, J. Is not reputation evidence of the boundary of parishes?]

Lord TENTERDEN, C. J.—This being a question where reputation would be evidence, this lease was properly admitted. With regard to the rates, I am of opinion that they were properly received (*a*). Setting a cross against the names of the parties rated is the usual mode of denoting that the money is received. These documents being admissible, the question is reduced to a case of contradictory evidence; and on whichever side we may think that the balance of evidence preponderated, there was clearly evidence on both sides, upon which the jury might form their own conclusion.

Rule refused.

(*a*) *Vide ante*, iii. 268.

WILLIAMS *v.* JONES.

An award made by a barrister cannot be questioned on the ground of any statement not appearing on the face of the award, or annexed to it.

A DISPUTE between the parties having been settled by an arbitration, a second dispute between the same parties was

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referred to a second arbitrator, who made his award in favour of the defendant. The day before the second award was made the arbitrator wrote a letter to the plaintiff's attorney, stating that he felt himself bound to make an award in favour of the defendant on the ground that the measure in dispute had arisen before the former reference, and that although he thought the first arbitrator mistaken, he considered himself concluded by the award.

Campbell now moved to set aside the second award, on the ground that the arbitrator was mistaken in point of law, in supposing that he was concluded by the first award. In the late case of *The Ayre and Calder Navigation* (*a*), the Court set aside the award upon matter contained in a letter written by one of the arbitrators. [*Littledale*, J. That was to shew that the award extended to matters not within the submission.] The letter here may be considered as contemporaneous with the award.

LITTLEDALE, J.—If you refer to a gentleman at the bar you are bound by his decision, unless it appear on the face of the award, or of some paper annexed, that the arbitrator wishes to raise the question.

Rule refused.

(*a*) *Ante*, iv. 728.

BOWEN and another *v.* FOX and others.

Trover will not lie against a party with whom the certificate of registry of a ship is deposited as a security for advances, upon a refusal to deliver up such certificate without payment.

TROVER for the certificate of registry of the ship Gratitude(*a*). Plea, not guilty. At the trial before *Bur-*

(*a*) The declaration contained also special counts for refusing to deliver the certificate of registry, which were not proved.

Quære, What shall be a wilful detention of a certificate of registry, authorising the interference of a magistrate under 4 *Geo.* 4, c. 41, s. 25.

Quære, As to the power of one part-owner of a ship to appoint a master, and to displace a master appointed by another part-owner.

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roughs, J.(*a*) at the last Bodmin Assizes, the following facts appeared:—The plaintiffs were the principal owners of the ship Gratitude, of which *Bowen* was captain, one sixty-fourth share being held by a seaman on board of the name of *Myers*. In 1823 the Gratitude being chartered to take a cargo of German linens from Hamburgh to Vera Cruz, in the course of her voyage was obliged to put into Ramsgate, at which place *Myers*, having taken offence at the captain, deserted the ship and went to London, where he remained. The Gratitude proceeded on her voyage down the Channel, and meeting with stormy weather, which occasioned some damage, she put into Falmouth, where, at the request of the defendants, they were appointed agents to the ship by *Bowen*. The repairs having been done and the Gratitude being about to sail, she sustained further injury in the harbour, rendering more extensive repairs necessary. Whilst these were going on, the butcher, who had supplied the crew with meat, arrested the captain. The defendants procured his liberation upon his depositing with them the certificate of registry, as a security for that and other advances made and to be made on account of the ship. The Gratitude being again completely repaired was removed into the outer harbour, upon which the defendants became apprehensive that the captain would sail without paying the ship's bill, though he had not taken his crew on board, and *Bowen* was again arrested, and was taken to Bodmin gaol at the distance of 35 miles. On leaving Falmouth *Bowen* appointed his brother *Benjamin* to be master during his absence. The defendants were requested by *Benjamin Bowen* to give up the certificate to the new master, and upon their refusal an application was made under 4 *Geo.* 4, c. 41, s. 25 (*b*), to the Mayor of

(*a*) Counsel for the plaintiffs, *Merewether*, Serjt., *Manning*, and *Coleridge*; for the defendants, *Wilde*, Serjt., *Erskine*, and *Follett*.

(*b*) "And whereas it is not proper that any person, *under any pretence whatever*, should detain the certificate of registry of any ship or vessel, or hold the same *for any purpose other than the lawful use and navigation of the ship or vessel for which it was granted*, be it therefore

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Falmouth, as a magistrate, to compel the defendants to restore the certificate of registry, but the mayor refused to

enacted, that in case the master of any ship or vessel, or any other person who shall have received or obtained, by any means or for any purpose whatever, the certificate of the registry thereof, (whether such master or other person shall be a part-owner or not,) shall wilfully detain and refuse to deliver up the same to the proper officers of his Majesty's customs for the purposes of such ship or vessel as occasion shall require, it may and shall be lawful to and for any owner or owners of such ship or vessel, the certificate of registry of which shall be detained and refused to be delivered up as aforesaid, to make complaint on oath against the master of the ship or vessel or other person who shall so detain and refuse to deliver up the same, of such detainer and refusal, to any justice of the peace residing near to the place where such detainer and refusal shall be in Great Britain or Ireland, or to any member of the Supreme Court of Justice or any justice of the peace in the islands of Jersey, Guernsey, or Man, or in any colony, plantation, island, or territory to his Majesty belonging, in Asia, Africa, or America, or Malta, Gibraltar, or Heligoland, where such detainer and refusal shall be in any of the places last mentioned; and on such complaint the said justice or other magistrate shall and is hereby required, by warrant under his hand and seal, to cause such master or other person to be brought before him to be examined touching such detainer and refusal, and if it shall appear to the said justice or other magistrate, on examination of the master, or other person, or otherwise, that the said certificate of registry is not lost or mislaid, but is wilfully detained by the said master or other person, such master or other person shall be thereof convicted, and shall forfeit and pay the sum of 100*l.* and on failure of payment thereof he shall be committed to the common gaol, there to remain without bail or mainprize for such time as the said justice or other magistrate shall in his discretion deem proper, not being less than three months nor more than twelve months; and the said justice or other magistrate shall and he is hereby required to certify the aforesaid detainer, refusal and conviction to the person or persons who granted such certificate of registry for such ship or vessel, who shall, on the terms and conditions of law being complied with, make registry of such ship or vessel *de novo*, and grant a certificate thereof conformably to law, notifying on the back of such certificate the ground upon which such ship or vessel was so registered *de novo*, and if such master or other person who shall have detained and refused to deliver up such certificate of registry as aforesaid, or shall be verily believed to have detained the same, shall have absconded, so that the said warrant of the justice or other magistrate cannot be executed upon him, and proof thereof shall be made to the satisfaction of the commissioners of his Majesty's customs, it shall

interfere. Shortly afterwards, *Myers* was brought down from London to appoint another master, to whom the defendants delivered the certificate, under an order obtained by them from the mayor; and, the vessel sailing upon her voyage, *Bowen* was immediately liberated from prison. He followed the vessel to Vera Cruz, and on his arrival there found that the goods had been landed by the supercargo, and that his ship had been sold by the intrusive captain, from whom no information as to the grounds of this proceeding, and no account of the produce of the sale had ever been obtained. Upon this state of facts it was contended on the part of the defendants, that the original delivery of the certificate of registry being made for a valuable consideration, the defendants acquired a lien for their advances, and for their responsibility to the tradesmen who repaired and victualled the ship; that the refusal to deliver the certificate to *Benjamin Bowen* was not evidence of a conversion, and that the subsequent delivery of this instrument to the master appointed by *Myers*, was justified by that appointment. On the part of the plaintiffs, it was answered that the statute expressly provided that the certificate of registry should never be held for any other purpose except the navigation of the ship, and that therefore no lien could be acquired; and that at all events a delivery to a person nominated as master by *Myers*, who was the owner of a sixty-fourth part, and who had no power to displace a master who was appointed by all the part-owners, and who himself held an eighth share of the ship, was a wrongful conversion of the certificate, which had occasioned an utter destruction of the plaintiffs' property. The learned Judge ruled, that *Myers*, as part-owner, had authority to appoint a master to the ship, and that the master so appointed was entitled to

be lawful for the said commissioners to permit such ship or vessel to be registered *de novo*, or otherwise, in their discretion, to grant a license for the present use of such ship or vessel, in like manner as is hereinbefore provided in the case wherein the certificate of registry is lost or mislaid."

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have the certificate of registry. His lordship told the jury, however, that if they were of opinion that the defendants had been guilty of fraud in the transaction, they should return a verdict for the plaintiffs. A verdict was found for the defendants, which

Merewether, Serjt. now moved to set aside. The statute 4 *Geo.* 4, c. 41, s. 25, prohibits, under heavy penalties, the detention of the certificate of registry, under any pretence whatsoever, for any purpose, except the use and navigation of the vessel (*a*). [Lord *Tenterden*, C. J. Looking at the language of the statute, this clause appears to be introduced not with a view to the interest of the owners, so as to prevent other persons from obtaining a lien. The certificate is to be given up to the officer of the customs.] The object of the clause was to prevent any impediment to the sailing of the ship. [*Bayley*, J. Suppose the ship requires repairs, and the master says, I have no money, but I will deposit the registry as a security that I can obtain it from the owners. Here it seems to have been placed in the hands of the defendant as a security for advances. The question is, whether a party can be said wilfully to detain where he has a lien.] The preamble seems to say that he would, because he cannot hold. It supposes every refusal wilful.

Lord TENTERDEN, C. J.—It does not follow that this action can be maintained. This action is founded on the common law right of property, not upon the statute; but at common law the party cannot sue for a conversion without paying what is due. He should have pursued the remedy given by the act. The officer of the customs should be required to interfere. The effect might be to make the pledge of no avail.

(*a*) *Ante*, 5, (*b*).

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BAYLEY, J.—It is not necessary to give any opinion whether the owners had a right to have this certificate of registry back again.

LITTLEDALE, J. and PARKE, J. concurred.

Rule refused.

WILLIAMS *v.* WARING.

A memorandum at the foot of a promissory note indicating a particular place of payment, forms no part of the contract, though shewn to be contemporaneous with the note itself.

ASSUMPSIT. The plaintiff declared as the indorsee of a promissory note, made to the plaintiff, without noticing any place of payment. Plea, non assumpsit. At the trial, before *Jervis*, J. at the last assizes for the county of Denbigh, the note appeared to have the following memorandum:—"At Messrs. B. & Co. Barbican, London." The whole of the note and memorandum was written by the defendant at the same time. It was contended that this was a variance, and that the declaration should have described the note as payable at the place mentioned in the memorandum. The learned judge over-ruled the objection, but reserved the point.

Campbell now moved accordingly to enter a nonsuit. The circumstance of the particular place not being contained in the body of the note is immaterial, where it is shewn that the whole was done at one and the same time. Thus in *Trecothick* v. *Edwin* (*a*), it was held by Lord *Ellenborough* that where the place of payment is printed at the foot of the note it formed part of the contract. That decision proceeded not upon any distinction between printing and writing, but upon the evidence afforded that the condition must have been there at the time the note was signed. Here the fact was proved. The contract is to be gathered from the four corners of the instrument. [*Parke*,

(*a*) 1 Stark. N. P. C. 468.

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J. The late act (*a*) applies only to inland bills of exchange. Lord *Tenterden*, C. J. In point of practice there is a well known distinction between a place of payment inserted in the body of the note, and a place mentioned in a memorandum at the foot of a note; in the former case it is considered as forming part of the contract, but where the place has been mentioned only in a memorandum at the foot of a note, I am not aware of any inquiry as to the time at which the memorandum was made. *Parke*, J. The question is, what the party meant by it. *Bayley*, J. *Exon* v. *Russell* (*b*) appears to me to be in point. In that case the memorandum was on the note at the time it was signed by the defendant, which being declared upon as payable at a particular place, was held to be misdescribed.]

Lord TENTERDEN, C. J.—The distinction has been so long acted upon, and the case cited by my brother *Bayley* is so expressly in point, that I think this Court is bound to adhere to the course which has been hitherto adopted.

Rule refused.

(*a*) 1 & 2 *Geo.* 4, c. 78.

(*b*) 4 M. & S. 505. The ground of that decision was the opinion then held by the Court of King's Bench, that a particular place of payment designated in an acceptance or in a promissory note, formed no part of the contract, contrary to the doctrine held by the Court of Common Pleas, and to the ultimate decision of the House of Lords, in *Rowe* v. *Young*, 2 Brod. & B. 165.

BENNETT *v.* SKARDON and another.

Motion to set aside an award under a reference at nisi prius allowed to be made after the first four days of term, where the award was published too late in the vacation to take the necessary proceedings before.

TRESPASS, quare clausum fregit. Plea, not guilty, and liberum tenementum. At the trial, before *Tindal*, C. J. at the last assizes for the county of Devon, a verdict was taken for the plaintiff, subject to a reference to an arbitrator, who was to set out boundaries, &c. The arbitrator made his award at Plymouth, 215 miles from Lon-

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don, on the 4th of November, and thereby directed a verdict to be entered for the defendants. The plaintiff was advised that the award was bad in point of law. The examinations being very long, it was impossible for the plaintiff's attorney to consult his client to get ready a case for the opinion of counsel, and to obtain that opinion before the expiration of the first four days of the term. On the second day of the term, *R. Bayly* obtained the following rule:—

It is ordered, That all proceedings in this cause, and under the award made in this cause, be stayed until Friday next; and if any rule shall within that time be made to shew cause why the award should not be set aside, until such rule shall be discharged, and that if such rule shall be made absolute, then that there be a new trial in this cause. And it is further ordered, that if no motion to set aside the said award shall be made within the time aforesaid, the said award do stand absolutely.

This rule was applied for upon the following cases:— *Rogers* v. *Dallimore* (*a*); *Lee* v. *Lingard* (*b*); *Borrowdale* v. *Hitchener* (*c*); *Rawsthorn* v. *Arnold* (*d*).

(*a*) Though the Court would in general adopt the limitation of time prescribed by 9 & 10 *Will.* 3, cap. 15, under an order of reference, yet when they see sufficient cause they will interpose their authority, though the time is elapsed. 1 Marsh. 471; 6 Taunt. 111.

(*b*) 1 East, 401. When a verdict is taken pro formâ, subject to an award, the sum afterwards awarded is to be treated as if it had originally been found by the jury, and the plaintiff (and therefore also the defendant, where a verdict is directed by the award to be entered in his favour) is entitled to enter up judgment for the amount, without first applying to the Court for leave to do so.

(*c*) 3 B. & P. 244. If a verdict be taken for the plaintiff at nisi prius, subject to an award, and the order of reference be made a rule of Court, the verdict may be entered pursuant to the award, without any application to the Court; if in such a case the award be made before the term, the opposite party can impeach it only within the first four days of the term.

(*d*) 9 D. & R. 556; 6 B. & C. 629. Motion to set aside an award made under an order of nisi prius, must be made within the time allowed for moving for a new trial, although, per *Abbott*, C. J., the Court might not insist rigidly upon the compliance with that rule, if any sufficient ground were stated for indulgence.

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HUNT and another, assignees of W. D. GILBERT and T. GILBERT, bankrupts, v. MORTIMER and others.

If *A.* advance money to *B.*, an insolvent trader, for the purpose of enabling *B.* to execute an order for goods, upon the terms of being repaid out of the price of the goods, a payment made by *B.* to *A.* out of the price when received, is not a fraudulent preference.

ASSUMPSIT, for money had and received to the use of the plaintiffs as assignees. At the trial before Lord *Tenterden*, C. J., at the sittings at Guildhall after last term, the following facts appeared:—The defendants, who were ironmongers, had been in the habit of advancing money to the *Gilberts*, who were opticians, for the purpose of enabling the latter to execute orders for the East India Company, which advances were repaid out of the money received from the Company, whose payments were made in bills at six months. In May, 1827, the bankrupts applied to the defendants for an advance to enable them to complete an order received from the Company, and the money, 2,500*l.*, was advanced by the defendants upon the terms of their being repaid out of the money to be received from the Company. Between July and November, 1827, the *Gilberts* were arrested by several of their creditors, and one of the defendants became bail for them in six actions. In November, 1827, the amount of the order, being due, was received by the defendants. The *Gilberts* stopped payment on the 30th November. The commission issued in May, 1828, upon an act of bankruptcy committed in December, 1827, though *T. Gilbert*, who lived in the country, appeared to have committed an act of bankruptcy in October, 1827. The learned judge told the jury, that as in permitting the defendants to receive the money from the East India Company, the *Gilberts* appeared to have acted with good faith, in pursuance of a previous agreement, the transaction did not amount to a fraudulent preference, and that as no commission had issued within two months, the payment could not be invalidated by an act of bankruptcy of which the defendants had no cognizance. A verdict having been found for the defendants,

F. Pollock now moved for a new trial, on the ground that the transaction amounted to a fraudulent preference, which was not protected in the manner stated to the jury. This debt was not assigned, nor was any notice given to the Company that the defendants had become interested in the payment. [*Bayley*, J. The defendants lend money upon an express stipulation that they shall be repaid out of the particular fund.] A party has no vested interest in the proceeds of an adventure, in respect of which he advances money. The *Gilberts* had in law a right to apply the money due from the East India Company to any purpose which they might deem expedient. [Lord *Tenterden*, C. J. The money was advanced for the very purpose of executing the orders. *Parke*, J. That is, in effect, an assignment. Notice to the debtor is necessary only for the purpose of taking the case out of the statute of *James* (*a*).] By the acts of the defendants the credit of the traders was bolstered up till the defendants had recouped themselves by obtaining payment. The object was to enable the traders to linger on till the defendants had got the money. In the case of *Parker* v. *Cox*, which is now pending, a rule was obtained on the ground that the defendant had kept up the credit of the bankrupt and had paid his clerks until the money was received. [Lord *Tenterden*, C. J. That case is quite different from the present. In *Parker* v. *Cox* there was no loan of money to enable the trader to execute the particular order.] That part of the present case, which is meant to be assimilated to *Parker* v. *Cox*, is the defendants' giving bail for the bankrupts in six actions, and thereby keeping them above water. It should have been left to the jury to say whether there was not an unusual interference by the defendants in the affairs of the bankrupts for the purpose of putting off the evil day. That was a fraud on the bankrupt laws. Suppose a trader borrows money or obtains goods, and says, when the voyage is ended I will pay you out of the proceeds. [*Bayley*, J. That is not this case.] In the ordinary course of business the *Gilberts*

(*a*) 21 *Jac.* 1, c. 19, s. 11; and see 6 *Geo.* 4, c. 16, s. 72.

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would have been bankrupts long before, but they were kept out of prison solely by the interposition of the defendants, whose object was to defeat the statute, knowing that the *Gilberts* were irrecoverably insolvent. It would have been very different if the assistance given by the defendants had been a transaction in the ordinary course of business. Here they interfere in an unusual manner for the purpose of effecting a particular object. [*Parke*, J. Have you any authority for saying that notice of the assignment of a debt is necessary, except for the purpose of getting rid of the reputed ownership, under 6 *Geo.* 4, c. 16, s. 72, following the provisions of the statute of *James*?] None has been discovered. But as in the case of usury, the law will not suffer the *spirit* of the statute to be evaded. If any advantage was to be derived by the defendants from postponing the issuing of the commission, it should have been left to the jury whether the conduct of the defendants had not been directed to that object, which was to postpone those who furnished goods to those who furnished money.

Lord TENTERDEN, C. J.—I thought at the trial that it would be carrying the law of fraudulent preference to a greater extent than it had yet been carried to treat this transaction as a fraudulent preference, and I am still of opinion that we ought not so to treat it.

BAYLEY, J.—I cannot see any premises from which such a conclusion can be drawn.

LITTLEDALE, J.—Two things must concur to make a fraudulent preference, contemplation of bankruptcy and a voluntary payment. Here the money was lent for a specific purpose, to be repaid out of a particular fund. Far from being voluntary, the payment was the subject of a specific contract. Where a creditor has trusted in respect to the general credit of the trader, if he is paid he obtains

an advantage over those creditors who remain unpaid. In this case the defendants obtained no advantage at all. Here, but for the specific contract, the defendants, knowing the traders to be insolvent, would not have lent the money at all; it would have remained safe in their own pockets.

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PARKE, J.—There is no pretence for calling this a fraudulent preference. When looked at, this transaction is nothing more or less than an equitable assignment of a portion of the particular fund, in satisfaction of money lent for the purpose of creating that fund; which is very different from the payment of an antecedent debt contracted without reference to such fund. If at the time of the bankruptcy the debt from the East India Company had remained unpaid, the bankrupt would have had no title to that portion of the debt which had been appropriated to the defendants, except as apparent owner under the 72d section of 6 *Geo.* 4, c. 16. But here the money was paid over before the act of bankruptcy.

Rule refused.

PHILLIPS, Assignee of ARTON, *v.* HOPWOOD.

TROVER. At the trial before Lord *Tenterden*, C. J., at the sittings at Westminster after last Trinity term, the case turned upon the sufficiency of the act of bankruptcy. The commission issued in July, 1825. The alleged act of bankruptcy was committed in March, 1825. By 5 *Geo.* 4, c. 98, which came into operation on the 21st of June, 1824, all the prior statutes respecting bankrupts were repealed, and by 6 *Geo.* 4, c. 16, the act 5 *Geo.* 4, c. 98, was repealed as from the 2d May, 1825. The learned judge was of opinion that the act of bankruptcy was sufficient to support the commission, and the plaintiff obtained a verdict.

Where a repealing statute is repealed, the first statute is, after the day on which the third statute takes effect, revived ab initio, and not merely as from that day.

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J. Williams now moved for a new trial. Upon the 1st of May, 1825, all the bankrupt acts antecedent to 5 *Geo.* 4, c. 98, stood, by that act, absolutely repealed. [Lord *Tenterden*, C. J. The 6 *Geo.* 4, c. 16, put an end to 5 *Geo.* 4, c. 98, as if it had never existed.] *Maggs* v. *Hunt* (*a*) is directly in point. [*Bayley*, J. Upon the 2d of May all the former statutes were revived.] It is submitted that they were revived only from the 2d of May, the date of the last repealing statute, 6 *Geo.* 4, c. 16. During the whole of the 1st of May the former statutes were dead, they would not revive retrospectively. [*Bayley*, J. This commission does not depend upon any thing done on the 1st of May. If the act of bankruptcy had been between the 2d of May and the 1st of September, a commission might have been sued out before the 1st of September (*b*).] In *Bacon's Abr.* Statutes, "*From what time to have effect*" (*c*), it is said, that "It is the general rule that no statute is to have a retrospect beyond the time of its commencement, for the rule and law of parliament is, that "*nova constitutio futuris formam debet imponere, non præteritis.*" And the same rule appears to be deducible from the cases which are collected in 19 *Vin. Abr.* Statutes, B.

Lord TENTERDEN.—The old statutes were in force in March, and also in July.

PARKE, J.—The statutes were in force when the act of bankruptcy was committed, and when the commission issued.

Rule refused.

(*a*) 4 Bingh. 212.

(*b*) The day on which the provisions of 6 *Geo.* 4, c. 16, except as to the repeal of 5 *Geo.* 4, c. 98, began to operate.

(*c*) 5 Bac. Abr. Statutes, (C.)

CLAY, Assignee of MALLEYS, a Bankrupt, *v.* HARRISON. 1829.

After stoppage in transitu the vendee ceases to have an insurable interest.

And a policy effected before the stoppage becomes thereby void.

ASSUMPSIT on two policies of insurance, each for 100*l.*, on a cargo of deals, per Providence, *Younge*, from Petersburgh to Hull, laying the interest in the bankrupt. At the trial, before *Bayley*, J., at the York Spring Assizes, 1828, the question raised was, whether the interest was in the bankrupt at the time of the loss. A verdict was found for the plaintiff for 200*l.*, subject to the opinion of the Court upon a special case disclosing the following facts:—On the 20th January, 1825, *Malleys*, the bankrupt, ordered of *Hubbard*, who had a house at London and at Petersburgh, two cargoes of deals, to be paid for by *Malleys*'s acceptance, at three months from date of shipment, on receipt of invoice and bill of lading. In October, 1825, the deals were shipped on board the Providence for Hull. In November, 1825, *Malleys* received an invoice, with a bill of lading indorsed in blank, and accepted *Hubbard*'s draft, payable 24th January, 1826, for 923*l.* 2*s.* 6*d.*, amount of invoice. In September and October, 1825, the defendant subscribed the two policies on which the action was brought. On her voyage to Hull the Providence was wrecked near Elsinore, 5th January, 1826. The cargo was saved, but was so much damaged that *Younge*, the master, did not think it worth sending out a ship for. On the 23d January, 1826, *Malleys* first heard of the loss, and he immediately gave notice to the defendant of abandonment of all his right and interest *in the vessel* so far as concerned his subscription, and requiring payment of the same, as a total loss, which notice the defendant refused to accept, unless he could put him in possession of the goods saved. *Malleys* was insolvent on the 23d January, 1826, and on the following day his acceptance was duly presented for payment, and dishonoured. On the 4th February, 1826, *Hubbard* gave notice to the defendant not to pay the loss otherwise than to the order of himself, as the person solely interested. On

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the 11th February, 1826, *Hubbard* sent one of the bills of lading to his agent at Elsinore. This bill of lading, which was to order, and indorsed in blank, reached the agent on the 3d March, 1826; whereupon he applied to the agent of the ship, who agreed to deliver the cargo; but no further possession was taken until *Hubbard* received 271*l.* 7*s.* 10*d.*, the net proceeds of a sale which took place on the 22d May, 1826. An action was brought by *Hubbard* against *Malleys* in Easter term, 1826, on his acceptance, and notice of trial was given for the first sittings in Trinity term, but the record was withdrawn. *Malleys* became bankrupt 23d May, 1826. *Malleys*'s acceptance still remains in the possession of *Hubbard*, but has not been proved on *Malleys*'s estate.

Patteson, for the plaintiff. The plaintiff is entitled to judgment on three grounds. First, there was a complete total loss before the attempt to stop in transitu, and which cannot be affected by any thing which occurred afterwards. Secondly, there could be no stoppage in transitu, because there was an abandonment and change of property, and because the transitus was at an end before the supposed stoppage in transitu. Thirdly, the effect of stoppage in transitu is not to alter the property, but merely to create a lien, leaving an insurable interest in the bankrupt. Upon the first point the dates are very material. The contract was to pay by bills at three months; the loss happened on the 5th January, 1826, nineteen days before the bill became due; intelligence of the loss arrived on the 23d January, the day before the bill became due. [Lord *Tenterden*, C. J. I suppose no point is intended to be made as to the form of the abandonment. The notice is, that he abandons his interest *in the ship*, in which he had no interest.] The objection taken to the notice was, that *Malleys* was not in a situation to abandon. *Malleys* was bound to give every facility to the underwriters to obtain possession of the property abandoned. If any thing had been recovered from the proceeds of the sale, the bankrupt would have been bound to account to the defendant for the

amount. *Havelock* v. *Geddes* (*a*). [Lord *Tenterden*, C. J. The whole case seems to turn upon the effect of the stoppage in transitu. *Bayley*, J. The question will be, whether the consignee can expedite his right. There would have been a right to stop, as against the consignee, whilst the goods were on their way to England. Lord *Tenterden*, C. J. Does an abandonment vest the property? If it does, where is the use of asking for an assignment?] Circumstances equivalent to an indorsement of a bill of lading will prevent the right to stop in transitu. [*Bayley*, J. Supposing, after an abandonment, the goods were brought to England, would the vendor have a right to stop them in transitu?] It is conceived that he would not. The defendant cannot be allowed to take advantage of his wrongful act in refusing the abandonment which he was bound to accept. Secondly, there could be no valid stoppage in transitu, because the property had been transferred. The transitus was at an end when the goods were landed. In *Holst* v. *Pownal* (*b*), it was held, that possession obtained by the consignee, before the completion of the voyage, would not divest the right of the consignor to stop in transitu. But that nisi prius decision has since been qualified by the late case of *Foster* v. *Frampton* (*c*), in which it was held that if goods are shipped to be delivered at a particular place, and the consignee accepts them at an intermediate place, the transitus is at an end. Here the goods insured were accepted at an intermediate place by an abandonment to the underwriters. [*Bayley*, J. In this case the abandonment is not accepted by the underwriters. The question now before the Court is, whether the goods were on their way to a port of destination. It does not appear whether the goods could have been sent home by another ship or not.] Thirdly, supposing the goods to have been stopped in transitu, the effect of the stoppage is not to rescind the bargain, but merely to give to the vendor a right to re-possess and hold

(*a*) 10 East, 555.
(*b*) 1 Esp. N. P. C. 240.
(*c*) 9 D. & R. 168; 6 B. & C. 107; 2 C. & P. 469.

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the goods. [*Bayley*, J. After stoppage in transitu, the vendor may bring trover against the captain, if he withhold the goods.] That results from the vendor's qualified right of property, from his right of possession. In *Hodgson* v. *Loy* (*a*), it was laid down by Lord *Kenyon* that the right of the vendor to stop in transitu only created an equitable lien, and did not proceed on the grounds of rescinding the contract. By the sale itself the property passes to the buyer (*b*). The vendor has merely a right to retain the property until the price is paid, and not even that, if time is given for the payment. In *Bloxam* v. *Sanders* (*c*), it was held that trover would not lie for a vendee who had not paid for the goods, because though he had the property (*d*) he had not the right of possession. The whole judgment went upon that distinction. *Com. Dig. Agreement*, B. 3. This agrees with the judgment of *Buller*, J. in *Lickbarrow* v. *Mason* (*e*). Here, the price was to be paid by bill; but nothing has occurred to prevent the property remaining in *Malleys*. [Lord *Tenterden*, C. J. The vendor might stop in transitu before the bill became due, if in the interval the vendee became notoriously insolvent. If the goods had remained in the hands of the vendor, might he not have said, unless you pay me I will keep the goods as my own? *Bayley*, J. May not the vendor re-sell, unless the vendee will pay the price? And does he not abandon all claim against the vendee by re-selling?] In *Kymer* v. *Suwercropp* (*f*), it was held that where goods to be paid for on delivery are stopped in transitu, the vendor may still maintain an action for goods bargained and sold, if he offer to deliver them on being paid. In a late case the Court directed an account to be taken, in order to enable the vendor to prove for the difference. In *Bloxam* v. *San-*

(*a*) 7 T. R. 445.

(*b*) *i. e.* by the sale *and delivery*. *Vide ante*, ii. 566 n.

(*c*) 7 D. & R. 396; 4 B. & C. 941.

(*d*) *Sed vide ante*, ii. 566, n.

(*e*) 2 T. R. 63, 5 T. R. 367; 683; 4 Bro. P. C. 2d ed. 57.

(*f*) 1 Esp. N. P. C. 240; *ante*, 19.

ders (a), it was said that the contract was not rescinded by the stoppage in transitu. [*Bayley*, J. There the vendor had not any right of possesion. Lord *Tenterden*, C. J. The property passed in the first instance by the sale and the delivery on board the ship (b), subject to being re-vested in the vendor under certain circumstances, which gave him a right to put himself in the same situation as if the contract had never existed. *Littledale*, J. In *Langfort* v. *Tiler* (c), Lord *Holt* says, "That after earnest given, the vendor cannot sell the goods to another without a default in the vendee; and, therefore, if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then, if he does not come and pay and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person." So if the vendee become insolvent.] The property is not re-vested until something be done by the buyer.

F. Pollock, contrà. The great question in this case is, what is the effect of the stoppage in transitu. This is only a *constructive* total loss. The Court will not carry that to such an extent as to give it the effect of destroying the right to stop in transitu. The goods remaining may be worth more than the proof under the commission. The second point, which is the main question in the cause, has been argued upon a petitio principii. The distinction in the cases referred to is, between an *executed* delivery, and a stoppage in transitu, supported on the ground that the delivery had not been complete. *Bloxam* v. *Sanders* (d) is a case of executed delivery; whereas a stoppage in transitu implies that goods are still to be sent. The consignor must stop at his own peril. In cases of executed delivery the vendor may sue for the price in an action for goods sold and delivered, and may take the same goods in execution.

(a) 7 D. & R. 396; 4 B. & C. 941.

(b) *Ante*, ii. 566, n.

(c) 1 Salk. 113.

(d) 7 D. & R. 396; 4 B. & C. 941; *ante*, 20.

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By the contract of sale nothing passes but the right to have the goods. Until delivery the property is in the vendor. The vendee has jus ad rem, but not jus in re (*a*). Where there has been no delivery, or where the delivery, being defeasible, has been defeated, as here, the vendor may, upon the expiration of a reasonable time, treat the contract as dissolved. After taking that course he cannot sue for the price. It is true that in *Hodgson* v. *Loy* (*b*), Lord *Kenyon* denied that the right of the vendor to stop in transitu proceeded on the ground of rescinding the contract. But certainly the current of authorities is the other way. Here it is more reasonable to consider the contract as rescinded, the cargo having been sold by the vendor and the proceeds of the sale received by him. In *Lett* v. *Cowley* (*c*), *Gibbs*, C. J., says, that after stoppage in transitu the property is in the vendor; there is an actual re-vesting of the property. So in the case of The Constantia (*d*), it is termed a complete and effectual revendication. Whatever a bankrupt holds merely as trustee for others, does not pass to his assignees (*e*), who, therefore, cannot sue. It is submitted that the vendor could not prove against the estate; he could only sue on the special contract for not accepting and paying, &c.

Patteson, in reply. Stoppage in transitu is not per se a rescinding of the contract of sale. It has been said that the vendor may wait a reasonable time. Here he has made his election by bringing his action on the bill, which he still retains in his possession. The vendor would have had no right to sue if the contract had been rescinded; the bill should in that case have been immediately given up to the bankrupt. The seller and the buyer may both be said to have an interest in the goods after stoppage in transitu. It is sufficient to maintain this action if the bankrupt had *any*

(*a*) *Ante*, ii. 566 n.
(*b*) *Ante*, 20.
(*c*) 7 Taunt. 169.
(*d*) 6 Rob. A. R. 321.
(*e*) *Vide Carpenter* v. *Marnell*, 2 B. & P. 40.

interest. *Lett* v. *Cowley* (*a*) is very distinguishable. In the case of the Constantia, the question was, whether there could be stoppage in transitu without actual insolvency. [*Bayley*, J. In *Lett* v. *Cowley*, it was said that the property re-vested by the stoppage in transitu.] All the authorities shew that the property passes by the sale (*b*), though it is said on the other side that nothing passes by the sale but the right to have the property. In no case is it laid down in what manner the stoppage in transitu operates. It is submitted, however, that it operates merely to re-vest the possession. In those cases in which the expression "re-vesting the property" is found, that point was not before the Court. By holding that the effect of the stoppage in transitu was to re-vest the *property*, the vendor would not be in a better situation than if it were considered that the *possession* only re-vested. [Lord *Tenterden*, C. J. This is a very important case. *Kymer* v. *Suwercropp* was a case of an *executed* delivery.]

Cur. adv. vult.

Lord TENTERDEN, C. J. delivered the judgment of the Court.—The question in this case was, whether, at the time of the loss, the bankrupt was interested in the goods insured. This depended upon the effect of the stoppage in transitu, viz. whether it operated to rescind the contract and to re-vest the *property* in the vendor, or only to retain to the vendor the right of *possession* and to replace him in the same position as before he parted with the possession of the goods. This point does not appear to have been expressly decided; but we are of opinion that in the present case the bankrupt, after the stoppage in transitu, had no property in the goods insured, and that the action cannot be supported.

Judgment for the defendant.

(*a*) 7 Taunt. 169. (*b*) *Sed vide ante*, ii. 566, n.

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DOE, d. WILLIAM HARRIS, *v.* ELIZABETH HOWELL and others.

A. devises to *B.* for life, remainder to *C.* in fee, with power to *B.* in case *C.* should die before *B.* and *B.* should have no other child living at her death, to devise as she should think proper. *C.* survived *A.* and died in the lifetime of *B.* The power of devising given to *B.* is a limitation in fee to her by way of executory devise during the life of *C.*, and upon the death of *C.* it becomes a vested remainder capable of being destroyed by fine.

EJECTMENT for a messuage and lands at Clifton in the county of Worcester. At the trial of this cause, before *Vaughan*, Baron, at the Spring Assizes for the county of Worcester, 1828, a verdict was taken for the plaintiff, subject to the opinion of this Court on the following case:—

Shortly before the 19th day of February, 1763, *John Ley* died, seised in his demesne as of fee of the premises, having first duly made and published his last will and testament in writing, executed and attested so as to pass his real estate, bearing date the 29th Sept. 1762, whereby he devised as follows: "I give, devise, and bequeath unto my daughter, *Elizabeth Harris*, all those, &c. (the premises in question,) To hold to her for and during the term of her life; and from and after her decease, in case her husband, *Wm. Harris*, shall survive her, then I give and devise the same unto the said *Wm. Harris* for the term of his life, and from and after the decease of the said *Wm. Harris* and *E.* his wife, and the survivor of them, then I give and devise the said messuages, &c. (the premises in question,) unto my grandson, *John*, the son of my said daughter *Elizabeth Harris*, and his heirs and assigns for ever; but in case my said grandson shall die before my said daughter, and she shall have no other child living at her death, then my will is that my said daughter shall give and devise the said premises to such person or persons as she shall think proper." The testator, at the time of his death was a widower: *Wm. Harris* and the testator's daughter, *Elizabeth*, who are named in the will, were married on the 28th of April, 1762; *John*, the grandson, mentioned in the will, was the illegitimate son of the said *Elizabeth* by the said *Wm. Harris*, and died in April, 1763, aged about two or three years; *Wm. Harris*, the lessor of the plaintiff, is the son and heir of the said *Elizabeth* and *Wm. Harris*, her

said husband, and was born in January, 1766; *Wm. Harris*, the husband, died in the month of November, 1770, leaving his said wife and his said son, *Wm. Harris*, the lessor of the plaintiff, him surviving. On the 27th of December, 1772, the said *Elizabeth*, the widow and relict of the first-named *Wm. Harris*, intermarried with one *Samuel Anthornies*. In Hilary term, 13 *Geo.* 3, the said *Elizabeth* and *Samuel Anthornies* (her second husband) duly levied a fine with proclamations of the premises, in which fine one *Robert Jones* was plaintiff, and the said *Elizabeth* and *Samuel Anthornies* and one *James Payne* were defendants; *Robert Jones* afterwards conveyed the premises to one *Child*, from whom, by divers mesne assignments, they came into the possession of the Earl of *Coventry*, whose tenants the defendants in ejectment are. *Elizabeth Anthornies* died a widow in May, 1819, leaving *Wm. Harris*, the lessor of the plaintiff, and her then only child, her surviving. The lessor of the plaintiff made an actual entry upon the premises within five years next after the death of *Elizabeth Anthornies* and before the day of the demise laid in the declaration, for the purpose of avoiding the fine, and also commenced this ejectment within one year after the making of such entry, and duly prosecuted the same.

The questions for the opinion of the Court are, 1st. What estate in the premises the said *Elizabeth* took under the devise; and, 2dly, Whether the title of the lessor of the plaintiff was or was not bound by the fine.

This case was first argued at the sittings after last Easter term, by *Busby* for the plaintiff and *Shutt* for the defendants.

A second argument was directed upon the question whether an executory devise might be converted into a contingent remainder by an event happening after the death of the devisor, viz. by the death of *John*, his grandson.

The case was argued upon this point by

Busby, for the plaintiff. The question is, whether the

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fee being displaced by the death of *John*, the estate of *Wm. Harris*, the grandson, became vested or contingent. No cases have been found directly in point. *John* was in existence at the time of the death of the testator, which distinguishes the present case from *Loddington* v. *Kime* (*a*). If *John* took a vested remainder, the limitation over could only be by way of executory devise. If there be a devise to *A.*, with a vested remainder in fee after his death to *B.*, a further estate to *C.* must be by way of executory devise by implication; there is no case to shew that the executory devise could be converted into a remainder by the death of the intermediate party. *Doe* v. *Selby* (*b*). In giving judgment in that case, *Bayley*, J. put the very case now before the Court. *Gulliver* v. *Wickett* (*c*). [*Parke*, J. He cannot have any vested estate if the child were living at the time of the death of tenant for life, the estate would be vested until the death of the tenant for life, it would be contingent. *Bayley*, J. No doubt, *John* took a vested fee defeasible; the question is as to the estate which *William* took. Lord *Tenterden*, C. J. No doubt, *John* took a vested remainder in fee.] If *John* took a vested remainder, the subsequent devise cannot be altered by his death. [*Bayley*, J. If the previous fee is destroyed does the limitation over continue an executory devise?] It is submitted that it does, *Gulliver* v. *Wickett*. [*Bayley*, J. It was not held there to be an executory devise; *Lee*, C. J. says, "The devise to *Katherine* for life, with remainder to such child as my wife is enceinte with in fee, is a good contingent remainder to a supposed child in ventre sa mere; and if there had been no devise to the wife for life, the devise to the child in ventre sa mere would have been a good executory devise." There I think he was wrong. It was a limitation to a child defeasible (*d*).] Here there is no child, even in embryo. [Lord *Tenterden*, C. J. No one can doubt that *John* took a vested remainder.]

(*a*) 1 Salk. 224, 228.
(*b*) 4 D. & R. 608; 2 B. & C. 926.
(*c*) 1 Wils. 105.
(*d*) 8 D. & R. 718; 5 B. & C. 866.

Shutt, contrà. That which was originally an executory devise may become a remainder by an event occurring after the death of the testator; the next question is, whether it is so in this case. There are many cases to shew, that by the removal of the intermediate devisee, that which was at first an executory devise may become a remainder. *Stephens* v. *Stephens* (*a*). It was remarked by Mr. *Fearne* (*b*) that in *Hopkins* v. *Hopkins* (*c*) it was held that the executory devise having once vested, the subsequent limitations thereupon became remainders. *Brownsword* v. *Edwards* (*d*), *Doe* d. *Fonnereau* v. *Fonnereau* (*e*). Then the only point is whether it became a contingent remainder; for this purpose it will be sufficient to refer to *Doe* v. *Scudamore* (*f*).

Busby, in reply. In the cases cited from Lord *Talbot*, at the time of the testator's death, the first devisee died, and the devise lapsed; in *Brownsword* v. *Edwards* the limitation was to take effect at twenty-one. The estate of *Wm. Harris*, the grandson, must depend upon the estate which *John*, the prior devisee, took. On the death of *John*, *William*, the grandson, may be considered as taking a defeasible fee.

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded thus:—This case depends upon the effect of the fine with proclamations levied by the testator's daughter and her second husband. When that fine was levied, the only parts of the will capable of operating were the devise to the testator's daughter, *Elizabeth*, for life, and the devise over, that in case she should have no other child living at her death, she should give and devise the premises to such person or persons as she should think proper. The ques-

(*a*) Cas. temp. Talbot, 228.
(*b*) Fearne, C. R. 526.
(*c*) Cas. temp. Talb. 44; 1 Atk. 579.
(*d*) 2 Vez. sen. 243.
(*e*) Dougl. 470.
(*f*) 2 B. & P. 294.

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tion whether the title of the lessor of the plaintiff is barred by the fine, depends upon the quality and character of the power given to his mother, *Elizabeth*, to give and devise the premises in case she should have no other child living at her death. It is a maxim of law, that no limitation shall be considered as an executory devise which may take effect as a remainder, the law favouring the alienation of property. Here, at the death of the testator, the limitation could enure only as an executory devise, by reason of the previous disposition of the whole fee. Upon the death of *John* this reason ceased, and the premises stood limited to *Elizabeth* for life, remainder to her husband, *Wm. Harris*, with the power to her to give and devise the fee if she should have no other children at her death. Upon the death of *John*, therefore, the character and quality of this limitation changed, and it became a contingent remainder, conformably to the principle upon which executory devises are allowed, namely, that of giving effect to the intention of the testator. In *Stephens* v. *Stephens* the limitations over must have been executory devises until the estate vested in the devisee in tail, when those subsequent limitations took effect as vested remainders. In *Hopkins* v. *Hopkins*, limitations, considered as executory devises, became contingent remainders upon the birth of the intended first taker. If an executory devise shall become a contingent remainder after the death of the testator by the birth of a person capable of taking, the same change must take place by the death of a person whose interest alone caused the limitation to be considered as an executory devise. A limitation in a will which could at first have operated only by way of executory devise may, by a change of circumstances in the lifetime of the testator, operate so as to give a vested estate in possession, or a vested remainder, or a contingent remainder, as is laid down distinctly by Mr. *Preston* in his book upon Abstracts, vol. ii. page 154, and a change of circumstances after the testator's death may make a parti-

cular limitation operate at first as a remainder, and afterwards as an executory devise, or *è converso*. So in *Fearne* (*a*) it is shewn, that where a limitation which causes subsequent limitations to operate by way of executory devise is removed, such subsequent limitations will operate in the same manner as they would have done had such prior limitations never existed. In *Gulliver* v. *Wickett* there was a devise for life, with a contingent remainder in fee and an executory devise over, and it was held, that upon failure of the contingent remainder in fee the ultimate limitation took effect as an ordinary remainder upon the determination of the life estate. *Brownsword* v. *Edwards* is to the same effect. Upon these authorities we think it clear that a change of circumstances after the death of the testator, may convert into a remainder that which at the death of the testator could have taken effect only by the way of executory devise; if this be so, this case is clear; at the time the fine was levied the only vested estate was in *Elizabeth*, and the only other interest was a contingent remainder to such child or children as she should leave at her death, which remainder was destroyed by the fine.

Postea to the defendant.

(*a*) Fearne, Cont. Rem. 6th ed. 526.

DONLAN *v.* BRETT, Clerk.

THIS was an action for goods sold and delivered, money lent, &c., in which the defendant was held to bail for the sum of 575*l.* At the trial before Lord *Tenterden*, C.J., at Westminster, at the adjourned sittings after Trinity term, the plaintiff obtained a verdict for 82*l.* 9*s.* 6*d.* only. In the particulars of the plaintiff's demand he claimed a sum of 400*l.* as money due from the defendant to the plaintiff, as per memorandum bearing date 22d of August, 1828. The

A plaintiff arresting for a larger sum than is legally due, though without malice, is liable to pay the defendant's costs under 43 *Geo.* 3, c. 46. sect. 3.

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defendant obtained a rule, calling upon the plaintiff to shew cause why he should not pay the defendant's costs of the action. In the plaintiff's affidavit in answer to the rule it was stated, that this 400*l.* was the balance remaining unpaid of the purchase money for the next presentation to a living, which the defendant had repeatedly promised to pay, and that he was indebted in other sums amounting to 90*l.*, for which the plaintiff held receipts signed by the defendant, but not stamped, and therefore not admissible in evidence.

Platt now shewed cause. The facts disclosed by the affidavits sufficiently negatived malice. In *Silversides* v. *Bowley* (*a*) it was held, that to entitle the defendant to his costs under this statute it must be shewn that the arrest was vexatious and malicious.

Hutchinson, contrà, was stopped by the Court.

BAYLEY, J.—This rule must be made absolute. There was no ground for the arrest.

PARKE, J.—As this point has been held both ways, the best course will be to refer to the act, the words of which are, "without reasonable or probable cause," not using the words "malice" or "maliciously." If, therefore, without reference to the question of malice, the arrest was without reasonable or probable cause, the defendant is entitled to his costs; and inasmuch as the 400*l.* was not due on a valid contract, the arrest, *quoad* that sum, was unfounded.

Rule absolute (*b*).

(*a*) 1 J. B. Moore, 92.

(*b*) See the next case.

For the form of the suggestion to be entered on the judgment roll to evidence the defendant's right to the costs allowed by the rule, see Tidd's Appendix, 4th edit. 396, 6th edit. 394.

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DAY *v.* PICTON.

Where a defendant is arrested without reasonable or probable cause, and the plaintiff recovers less than the sum sworn to, he is liable to costs, under 43 *Geo.* 3, c. 46, though no malice be shewn (*a*).

THE defendant, on the 16th of April, 1829, purchased of the plaintiff 70 dozens of port wine, to be paid for one half in cash on the delivery of the wine, and the other half by a bill of exchange payable four months after such delivery. The cash was paid, but no bill was drawn by the plaintiff on the defendant for the other half. On the 23d of April the defendant purchased of the plaintiff 37 dozens of pale sherry at 36*s.*, and 33 dozens of brown sherry at 37*s.*, to be paid for one half in cash on delivery, and one half in a bill at four months from the 1st of May. The defendant having made default in the payment of 64*l.*, being the stipulated cash payment on the sherry wine, and the plaintiff having ascertained that the defendant was offering the wine for sale at 26*s.* per dozen, arrested him for 193*l.*, being the amount of the cash payment then due, together with the sums for which the bills of exchange were to have been drawn and accepted. At the trial the plaintiff obtained a verdict only for the 64*l.* due in cash at the time of the action brought. A rule having been obtained calling upon the plaintiff to shew cause why the defendant should not be allowed his costs in this cause to be taxed by the master, pursuant to the statute of the 43d year of his late majesty King *Geo.* 3, c. 46, and ordering that in the mean time proceedings should be stayed,

Gurney and *White* now shewed cause. In *Edgington* v. *Hood* (*b*) the defendant was arrested for 60*l.*, and the plaintiff recovered 22*l.* only; but as there was no vexation, and the plaintiff conceived that he had a good cause of action for the whole amount, the Court discharged the rule. Here, the plaintiff acted *bonâ fide;* he stated that he

(*a*) See the last case.

(*b*) 2 Chit. Rep. 147. In that case the Court were of opinion that the plaintiff had fairly raised the question as to his right to recover the whole 60*l.*, and inclined to think that he ought to have had a verdict for that sum.

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thought he had a right to arrest defendant for 129*l.*, and said he had reason to believe that unless he resorted to this measure the whole debt would be lost. There is, therefore, no ground for imputing malice to the plaintiff, but both malice and the absence of probable cause must concur to entitle a defendant to the remedy provided by this statute, which is merely a summary mode of giving the party the benefit of an action for malicious arrest.

Scarlett, A.G., and *Payne*, contrà, were stopped by the Court.

BAYLEY, J. (*a*).—I think this rule must be made absolute. I take the rule to be, that where there is a reasonable and probable cause an arrest may be made; otherwise not. Now here every lawyer must have known, that at the time that the defendant was arrested for the 193*l.* the plaintiff had no right to hold him to bail for that sum.

LITTLEDALE, J.—The plaintiff may have felt, that in justice and equity the money was fairly due to him, but in law it clearly was not.

PARKE, J. concurred.

Rule absolute.

(*a*) Lord *Tenterden*, C.J. was absent through indisposition.

The KING *v.* The Inhabitants of WILLOUGHBY-WITH-SLOOTHBY.

An estate in remainder, though vested, will not confer a settlement.

UPON an appeal against an order of two justices, whereby *William Stokes*, his wife and children, were removed from Huttoft to Willoughby-with-Sloothby, in the parts of Lindsey, in the county of Lincoln, the Court of quarter sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper being settled in Willoughby-with-Sloothby, *John Neal*, by indentures of lease and release of the 19th and 20th of March, 1825, in consideration of 105*l.*, conveyed a parcel of land and two unfinished dwelling-houses, situate in Huttoft, to the use of *Elizabeth Stokes* for life or widowhood, remainder to the use of the pauper in fee. The 105*l.* was money which had been bequeathed by the father of the pauper to him absolutely, the interest of which the pauper had subsequently by his deed, in consideration of natural love and affection and 10*s.*, settled upon his mother for life or widowhood, the principal, after her death, to be paid to himself. A further sum of 50*l.* was expended by the pauper, after the execution of the conveyance, in finishing the dwelling-houses, which sum had been bequeathed by the pauper's father to trustees in trust to pay the interest to the widow during her life or widowhood, and the principal, after her decease or marriage, to the pauper. The pauper paid the interest of the 105*l.* to the trustees, and the trustees paid it over to the mother. The pauper entered upon one of the houses and part of the land at the time of the execution of the conveyance. The mother let the other house and the remainder of the land for the space of one year after the execution of the conveyance, at the expiration of which year the mother told the pauper she would deliver up all the premises to him, and that he might do as he liked with them. The pauper then entered into possession of the other house and land, and let it, and received the rent himself and never accounted for it to his mother, and continued to occupy the same house he had previously occupied until 1828, when both were sold, and were conveyed by a deed, to which his mother, who remained a widow, was a party. The pauper received the whole purchase-money, and did not account for it to his mother. They both joined in the receipt to the purchaser.

Alderson, in support of the order of sessions. Unless the pauper had an immediate interest he had no right of

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residence. In *Rex* v. *Eatington* (*a*), where *A.*, residing upon a cottage of his own, conveyed it by lease and release to *B.*, with a proviso that *A.* should live in and occupy the cottage during his life, it was held, that inasmuch as the proviso reserved to *A.* a life estate, *B.* took only a remainder, which conferred no settlement by residence on the estate. It is immaterial for the present purpose to inquire whether the Court were right in putting that construction upon the proviso. The settlement was disallowed on the ground that the pauper took no immediate interest. The same principle was acted upon in *Rex* v. *Ringstead* (*b*). The operation of the will was inquired into for the purpose of ascertaining whether an immediate interest passed. Then this is a purchase; but it does not appear that the pauper has any interest to the amount of 30*l.* It is impossible to determine the value upon the case as it is now stated.

N. R. Clarke, on the same side, referred to the cases of *Rex* v. *Staplegrove* (*c*) and *Rex* v. *Houghton-le-Spring* (*d*).

Fynes Clinton, contrà. *Rex* v. *Eatington* was decided upon another point. It was there assumed to be necessary that the party claiming a settlement by estate should have a right of possession. In *Rex* v. *Staplegrove*, which was decided afterwards, it was held that it was not necessary that the party should have a right of possession at the time of the residence, but that he gained the settlement being entitled to the reversion only. [*Parke*, J. In that case there were strong grounds to believe that the demise for a thousand years was a mortgage term.] So here, the mother lets the pauper into possession. In *Rex* v. *Houghton-le-Spring* possession was held not to be necessary. The distinction is, that if he is in possession as mortgagor, he is in possession by leave and licence of the mortgagee. [*Bayley*, J. In *Rex* v. *Houghton-le-Spring* the pauper had a present

(*a*) 4 T. R. 177.
(*b*) *Ante*, iv. 67; 9 B. & C. 218.
(*c*) 2 B. & A. 527.
(*d*) 1 East, 247.

estate of freehold, not what the law calls a reversion.] In *Rex* v. *Ringstead* the point was not fully considered.

Whitehurst, on the same side. In *Rex* v. *Houghton-le-Spring*, Lord *Kenyon* says, "it seemed to me to be a most extraordinary proposition to establish that a man might be removed from a parish in which he had property, perhaps, to a considerable amount, but whether more or less in such a case is unimportant, because he has let it out, and that if he afterwards came there again he was liable to be treated as a vagrant. A man, though not in the actual occupation of his own estate, may have many reasons for wishing to live in the neighbourhood of it. He is entitled to the privilege of superintending it, but, according to the doctrine contended for, he may be sent to another part of the kingdom, if his settlement happened to be there."

BAYLEY, J.—A man who has a remainder only has no right to superintend. An estate in remainder expectant upon a prior estate of freehold, is not sufficient to confer a settlement. The party has no means of subsistence out of the actual profits or the rents. *Rex* v. *Houghton-le-Spring* only shews that if a party has a vested estate of freehold he need not actually occupy. There is a plain line of distinction between this case and those which have been mentioned. The Court cannot look at the quantum of rent, but simply at the immediate estate of freehold. Here the son never had the present estate of freehold.

LITTLEDALE, J., concurred.

PARKE, J.—This point was expressly decided, after a very long argument, in *Rex* v. *Ringstead*.

Lord TENTERDEN, C. J.—I concur in the opinion that an estate in remainder is not sufficient.

Order of Sessions confirmed.

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The KING *v.* MAINWARING.

The exemption in 50 *Geo.* 3, c. 41, s. 23, (the Hawkers' and Pedlars' Act,) in favour of the real worker or maker of goods, &c., or his children, apprentices, and known agents or servants usually residing with him, does not extend to an agent or servant residing in a separate dwelling-house, though solely employed by such worker or maker.

THE defendant was convicted before a single magistrate for the parts of Lindsey, in the county of Lincoln, under the statute 50 *Geo.* 3, c. 41, of the offence of exposing goods to sale without having obtained a licence. On appeal, the sessions confirmed the conviction, subject to the opinion of this Court upon the following case:—

Zachariah Boyle, on or before the 21st of October, 1828, was and still is a large china and earthenware manufacturer at Hanley, in Staffordshire. Before the said 21st of October he consigned to Gainsborough, a market town, to his own order, a quantity of china and earthenware, of which the several articles mentioned in the conviction formed a part. The said china and earthenware were conveyed by a carrier's boat from Hanley to Gainsborough, and the said *Zachariah Boyle* was the real worker and maker of all of it, and it was manufactured by him at Hanley aforesaid. *William Mainwaring*, the defendant, was, on or before the said 21st of October, and still is, a servant in the sole employ of the said *Zachariah Boyle*; he resided with his wife and family at Hanley, in a separate dwelling-house, his own freehold, being within three hundred yards of the house and manufactory of the said *Zachariah Boyle*, and never left that place except when employed elsewhere by his master. When at Hanley he superintended and assisted in manufacturing, and was employed by the said *Zachariah Boyle* to sell the before-mentioned china and earthenware at Gainsborough. His salary was a fixed yearly sum, and did not depend upon the amount of any sale which he might effect; nor did he receive any commission or benefit, nor was he liable to any charges or loss whatever which might arise or be incurred in the sale, conveyance, or otherwise, of the said china and earthenware, but rendered a regular account of the same to his master, who bore all losses and expenses, and received all the proceeds

and profits. The defendant took possession of the china and earthenware so consigned as aforesaid, and upon its arrival at Gainsborough took a room at an inn there, and on the day mentioned in the conviction sold part thereof by public auction. The defendant had no hawker's licence, and had previously been selling at Nottingham and other places.

N. R. Clarke and *Fynes Clinton*, in support of the conviction. The case depends principally on the construction of the 23d section of 50 *Geo.* 3, c. 41, by which it is enacted, "that nothing therein contained shall extend to prohibit any person or persons from selling any printed papers licensed by authority, or any fish, fruit, or victuals, nor to hinder the real worker or workers, or maker or makers of any goods, wares, or manufactures of Great Britain, or his, her, or their children, apprentices, or known agents or servants, *usually residing with such real workers or makers only*, from carrying abroad or exposing to sale and selling by retail or otherwise any of the said goods, wares, or manufactures of his, her, or their own making, in any mart, market, or fair, and in every city, borough, town corporate, and market town." The case of *The King* v. *Turner* (*a*) shews that an agent is within the act. The question for the consideration of the Court is, whether a person who resides in his own house, but whose principal employment is in the house of his master, can be said to be a servant or agent residing in his master's house. By requiring that the servant shall reside under his master's roof, the object of the statute will have been much better secured. If a person who forms no part of his master's family, may be sent about the country to sell goods in this manner, a great manufacturer may employ hundreds of agents in disposing of his goods in this manner, to the no small injury of the resident tradesmen, by whom the parochial and other local burdens are borne. From

(*a*) 4 B. & A. 510.

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these the itinerant vendor is exempted, and it is no great hardship that he should be subjected to the payment of the sum of 4*l.* 10*s.* per annum. The maker or manufacturer himself is exempted; so are his servants in some cases. But the question is, whether the additional words "usually residing with such real workers or makers only," are to have any weight.

Denman, Hildyard, and *Whitehurst,* contrà. The Court will pause before they act upon any supposed advantage to arise from extending the restriction. The exemption ought to have a liberal construction. If the act had contained no specific exemption for servants, it might have been contended that they were within the same protection with their masters. According to all fair construction the defendant was a servant usually residing with the maker. The word "only" shews that the meaning of the legislature was, that the agent should not be a person residing with any other parties as his employers. The act imposes a penalty, and restrains the common law right of trading wherever the party finds it to his advantage to trade. The object of the act being to restrain dealers from going from town to town, the words "usually residing with such workers or makers" must be understood with reference to that object, and are satisfied if the servant resides in the same town with his master. It is not necessary that he should reside in the same house. In 52 *Geo.* 3, c. 108, it is not required that the person vending the goods shall reside with the owner. The object of the statute was to confine the exemption to persons who were regularly and bonâ fide in the service of the manufacturer, and to exclude those who were merely constituted servants or agents for the special purpose. Residing in a place, does not necessarily mean sleeping there. In 2 *Inst.* 122, Lord *Coke* says, "If a man hath a house within two leets he shall be taken to be conversant where his bed is, for in that part of the house he is *most* conversant, and here *conversant* shall be taken for *most con-*

versant." Lord *Coke*, therefore, impliedly says that a man may be a resiant within two distinct leets. So the word "inhabitant" is not always used with reference to the place at which the party sleeps, as in cases upon the Statute of Bridges. The conviction also cannot be supported. [Lord *Tenterden*, C.J. The case is not before us for that purpose.] This Court has a general authority over the proceedings in inferior jurisdictions where the certiorari is not taken away. [Lord *Tenterden*, C.J. We must decide merely upon the point which the Court of quarter sessions have reserved for our decision. If the Court of quarter sessions had thought proper to put a question as to the form of the conviction, we should have been authorised to answer it.] It may be contended that even if no case had been reserved by the quarter sessions for the opinion of this Court, the mere circumstance of having appealed took the case out of the prohibition. But if the Court are to look only at the terms of the special case, that itself contains no statement that the defendant had not obtained a licence. [Lord *Tenterden*, C.J. The Court of quarter sessions very properly state so much of the case only as is necessary to raise the point upon which they require our opinion.]

Lord TENTERDEN, C.J., after stating the language of the 23d section, proceeded thus:—The words of an instrument are to be understood according to the subject-matter. Here they are explained by the context. The statute speaks of children and apprentices before it mentions the resident servants and agents. I think, therefore, that it means members of the manufacturer's family. If the construction which has been contended for were to prevail, a manufacturer in London might employ as many agents as he pleased, provided those agents lived on the eastern side of Temple Bar.

BAYLEY, J.—The defendant had no right of appeal unless it be given by statute. The same clause which gives

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the appeal takes away the certiorari. The meaning of the legislature must, therefore, be taken to be, that we are to consider the case only with reference to the specific point saved for the opinion of the Court. A point has been raised as to the 52 *Geo.* 3, c. 108, in which act children and servants are omitted. I entirely agree with Lord *Tenterden*.

LITTLEDALE, J.—I am of the same opinion. The word resident refers to the place where the party sleeps; that is so in all cases of settlement law. The position cited from Lord *Coke*, instead of assisting the defendant, seems to be rather the other way. In a late case (*a*) of an indictment against a party for not taking upon himself the office of constable, Lord *Tenterden* says, "For all the purposes of pecuniary charge such an occupier is an inhabitant; and therefore he is liable to church rates, to the repairs of highways, and to the repairs of bridges."

PARKE, J.—The only question for the Court is, whether the defendant falls within the description of servant usually residing with the real worker or maker. Taking these words in the sense in which they are commonly used, they mean a person who inhabits and sleeps in his master's house; and this construction is strengthened by the preceding words.

Order of Sessions confirmed.

(*a*) *Rex* v. *Adlard*, 7 D. & R. 340, 349; 4 B. & C. 772.

The KING v. the Inhabitants of ROXLEY.

Where, upon a yearly hiring from the 13th of May, the following 12th of May is excluded from the service by a dissolution of the contract, no settlement is gained, although the service continue 365 days, by reason of its being leap-year.

What shall be a dissolution of the contract, and what merely a dispensation with the service, is a question of fact for the Court of quarter sessions.

UPON an appeal against an order of two justices, whereby *Robert Farmery*, his wife and family, were removed from Roxley to Winterton, in the parts of Lindsey, in the county of Lincoln, the sessions quashed the order subject to the opinion of this Court upon the following case:—

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The pauper being unmarried, and without children, was hired before old May day, 1819, (13th May,) to serve *James Barrett*, in the appellant parish, from this old May day to old May day, 1820, as a servant in husbandry, at 15*l.* wages. The pauper served *Barrett* in the appellant parish until the 11th of May, 1820, when wishing to visit his friends (fifteen miles distant) and to attend some statutes (*a*) on the 12th of May on the way there, and avoid returning back to his master's, he requested his master's permission to go for altogether, and they settled the pauper's wages, and part was deducted for the time he had to serve. The pauper slept at his master's house, with his permission, on the evening of the 11th of May, and finally left his master's on the 12th (*b*).

N. R. Clarke, in support of the order of sessions. A day was wanting to complete the year of service. No settlement therefore was gained in Winterton. Whether the deficient day was caused by a dissolution of the contract or by a dispensation with the service was a question of fact, for the determination of which the Court of quarter sessions was the proper tribunal. That Court has decided, and there were abundant premises to warrant the conclusion to which they have come. If the inference was left to be drawn by the Court above, it was clearly a dissolution and not a dispensation. There is a concurrence of authorities to shew that this was a dissolution. The true criterion is to consider whether the master could still insist upon the service. This is laid down as the test by Lord *Ellenborough* in *Rex* v. *Rushall* (*c*). [*Bayley*, J. *Rex* v. *Hardhorn* with *Newton* (*d*) proceeds upon the same distinction.]

Fynes Clinton, on the same side, was stopped by the Court.

(*a*) Fairs for the hiring of servants; in some counties called "Mops."

(*b*) 1820 was leap year.

(*c*) 7 East, 471; 3 Smith, 452.

(*d*) 12 East, 51.

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Patteson, contrà. There was a good service for a year, and there was a good hiring for a year. [Lord *Tenterden*, C. J. referred to *Rex* v. *Ulverstone* (*a*).] There it was held that service for 365 days was enough, although the hiring was from Whitsuntide to Whitsuntide, and the servant was discharged before the second Whitsuntide, which shews that a service for a year of that extent is sufficient. In *Rex* v. *Ackley* (*b*), a service of 365 days, extending over a leap year, was held not to confer a settlement; but there the hiring was clearly insufficient, being from three days after Michaelmas until Michaelmas following, in leap year. The Court, however, seemed to think the service good. [*Bayley*, J. If not a good year as to the hiring, it would not be a good year as to the service. If the servant went into the service on the 1st of March, and left the service on the 29th of February, it would not be sufficient.] No dissolution of the contract is actually found. The pauper had a right in the morning of the 12th of May to go to the statute. [Lord *Tenterden*, C. J. He ceased to be a servant on the 11th.] In *The King* v. *Potter Heigham* (*c*) it was held that absence by consent of the master for one day before the end of the year would not defeat a settlement by hiring and service. [*Parke*, J. What did the sessions find in that case?] The sessions found nothing specifically on the question of dissolution or dispensation. [Lord *Tenterden*, C. J. Here the sessions only submit to this Court whether they lawfully may determine as they have done.]

Whitehurst, on the same side. This was not a dissolution of the contract at the time the master and servant separated. In *The King* v. *Potter Heigham*, though nothing was said as to the finding a dissolution or a dispensation, the judgment of the Court of quarter sessions implied that the contract had been dissolved. Here, if the case be understood to amount to a dissolution, to take effect from

(*a*) 7 T. R. 564.
(*b*) 3 T. R. 250.
(*c*) Burr. S. C. 690; 2 Bott, 316.

the 12th of May, a settlement would be completely acquired. It was not the object of the pauper to quit on the 11th of May, but on the 12th. He merely wished to visit his friends after the statute, instead of going back again. [*Bayley*, J. It is stated that the pauper slept at his master's house by his permission. No permission would have been necessary if the contract had not been dissolved.] The permission was introduced into the case for the purpose of shewing that the pauper did not sleep at his master's house surreptitiously. The master might employ him on the 12th before he went to the statute. [*Parke*, J. Where a bill of exchange is made payable at so many months after date, the calculation is made by calendar months, without reference to their length.] In the case of lapse the half year is computed as half 365 days, without regard to calendar months.

Lord TENTERDEN, C. J.—Whether that which took place between these parties amounted to a dissolution of the contract, or merely as a dispensation with the service, it was peculiarly proper for the Court of quarter sessions to decide. They have considered that what passed amounted to a dissolution. They have acted upon that view of the case in the order which has been made, and we could not interfere even if we thought the conclusion at which they had arrived to be erroneous. When a leap year occurs, a year must be understood to mean 366 days.

BAYLEY, J.—The statute 24 *Geo.* 1, c. 23, s. 2, speaks of bissextile, or leap year, consisting of 366 days (*a*).

The other judges concurred.

Order of Sessions confirmed.

(*a*) There appears to be no more reason for designating as a year a period of 365 days, which falls short of a complete revolution of the earth in its orbit, than a period of 366 days, which exceeds it.

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TINMOUTH v. TAYLOR.

A plaintiff in execution for costs exceeding £20, is not entitled to his discharge under 48 *Geo.* 3, c. 123, after having lain in prison twelve months.

Semble, that the statute does not apply to plaintiffs in any case.

THE plaintiff having been taken in execution for 34*l.*, the costs of a nonsuit, and having remained in execution above a year, *Archbold*, early in this term, obtained a rule calling upon the defendant to shew cause why the plaintiff should not be discharged out of custody. The application was founded upon 48 *Geo.* 3, c. 123, which enacts, "that all persons in execution upon any judgment obtained in any Court, &c. for any debt or damages not exceeding 20*l.*, exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged, may, upon application for that purpose, in the manner therein mentioned, be forthwith discharged out of custody as to such execution by the rule or order of such Court."

Coltman shewed cause. The title, the preamble, and the provisions of the statute distinctly point to defendants and not to plaintiffs. It is true that in *Roylance* v. *Hewling* (*a*), it was held that a plaintiff was entitled to his discharge under this statute. But supposing that case to have been rightly decided, it proceeded on the ground that the costs were a judgment-debt. Here then the debt exceeds 20*l.* He also cited *Rex* v. *Hubbard* (*b*), and *Rex* v. *Dunne* (*c*).

Archbold, contrà. After the case of *Roylance* v. *Hewling*, it cannot be contended that plaintiffs are not within the purview of the act. It is clear, from the language of the statute, that the party should not be detained in custody for the costs, whatever the amount might be, provided there were no debt or damages exceeding 20*l.*, exclusive of costs.

(*a*) 3 M. & S. 282. (*b*) 10 East, 408. (*c*) 2 M. & S. 201.

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BAYLEY, J.—The language of the act, primâ facie, applies to defendants only, and none of its provisions seem to have the least reference to plaintiffs. Supposing *Roylance* v. *Hewling* to have been correctly decided, the costs would have become a debt by the judgment exceeding 20*l.*

LITTLEDALE J.—The words of the statute manifestly apply to defendants. But assuming that plaintiffs may be included, the costs here would constitute a debt by judgment exceeding 20*l.*

PARKE J., concurred.

Rule discharged.

GAINSFORD *v.* MARSHALL.

The undertaking of the execution creditor to pay 3*s.* 6*d.* per week to the debtor under the Lords' Act, is satisfied by payment to the turnkey.

THE defendant, a prisoner in execution, obtained a rule calling upon the plaintiff to shew cause why he should not be discharged out of custody for non-payment of the allowance of 3*s.* 6*d.* per week, under the Lords' Act(*a*). This rule was obtained upon an affidavit stating that the turnkey had received for the defendant a half crown and a shilling from a person sent by the plaintiff, and that upon its being delivered to the defendant he discovered it to be a bad one, and returned it to the turnkey. The affidavit in answer stated that the plaintiff's son tried the shilling before he sent it, and that it was a good one, and that the person who carried it to the turnkey delivered the same shilling which he had received to the turnkey, who examined it, rung it, and said it would do.

Thesiger now shewed cause. The receipt by the turnkey was tantamount to a receipt of the money by the prisoner, *Fisher* v. *Bull*(*b*).

(*a*) 32 *Geo.* 2, c. 28; 26 *Geo.* 3, c. 44; 33 *Geo.* 3, c. 5; 39 *Geo.* 3, c. 50.
(*b*) 5 TR. 37.

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Chitty, contrà. The Court of Common Pleas, in a very recent case, has decided that the turnkey cannot bind the prisoner by the acceptance of bad money, *Agutter* v. *Wilson*. (*a*)

BAYLEY, J.—It is a settled rule in this Court that the turnkey is the person to receive the sixpences. If, as in the supposed case put by Mr. *Chitty*, the plaintiff's clerk had run away as soon as he had placed the money in the hands of the turnkey, or if the turnkey had promptly, after receiving the money, sent to say that it was bad, there would have been no acceptance by him. Here, on the contrary, no complaint was made on that day that the money was bad.

LITTLEDALE, J.—I am of the same opinion. For this purpose the turnkey is the agent of the prisoner, as it has been held in this Court; and it would be very inconvenient if it were held to be necessary that the party who brings the money should in all cases see the prisoner.

PARKE, J.—I am of the same opinion. It is not satisfactorily made out that the money sent by the plaintiff was bad.

Rule discharged.

(*a*) 7 Taunt. 7.

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T. M. YOUNG *v.* T. SPENCER and C. SPENCER.

CASE by reversioner. The first count stated that the defendants, being possessed of a messuage in Stowell Street, Newcastle, as tenants to the plaintiff, without his licence and against his will, pulled down part of the wall and opened a door into Stowell Street, whereby the said messuage was damaged and weakened, and the plaintiff was prejudiced in his reversionary interest therein. The declaration also contained counts in which it was alleged that the plaintiff was owner of other houses in Stowell Street, which were injured by the opening of this door. Plea, not guilty. At the trial before *Bayley*, J., at the spring assizes for the town and county of Newcastle, 1828, a verdict was, by the direction of the learned Judge, entered for the plaintiff with 1*s.* damages, subject to the opinion of this Court upon the following case:—

In March, 1825, the defendants became tenants of the plaintiff of a house in Stowell Street, for a term of seven years. In 1827, the defendants, without the leave and contrary to the wish of the plaintiff, opened a door from the house into Stowell Street, where the plaintiff had several other houses near to that occupied by the defendants: and evidence was given on both sides as to the effect thereby produced on the house in which the door was made, and on the plaintiff's other houses situate in the same street. The learned Judge directed the jury at all events to find a verdict for the plaintiff with nominal damages, on the ground that the defendants had no right to open the door; and also desired them to say whether any actual injury was thereby done to the house occupied by the defendants, or to the plaintiff's other houses in Stowell Street, in order that the opinion of the Court might be taken as to the other point, if they should find that no actual injury had been done. The jury found that the defendants did pull down the wall and erect the door without the leave and against the wish of the plaintiff, but that the house occupied by them was not

Where, in an action by the reversioner against the tenant of a house for opening a door in a wall, without the consent of the plaintiff, and thereby damaging the house and prejudicing the plaintiff's reversionary interest, the opening of the door is proved and all actual damage to the house is disproved, the jury should be directed to inquire whether the reversionary interest of the plaintiff has, or has not been injured. A nominal verdict entered for the plaintiff without such direction or inquiry, on the ground that the defendant had no right to make the alteration, was set aside.

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thereby weakened or injured in any respect, and that no injury was thereby occasioned to the plaintiff's other houses.

Ingham, for the plaintiff. All the rights of property remain in the landlord, except such as the landlord chuses to part with. In trees, the tenant has no interest, except as to the fruit and for repairs. If mines are mentioned in the lease, the lessee has a right to break the land in search of them. If mines are not mentioned, the lessee has only a right to work such mines as were open at the time of the demise. Here the door-way in question was not necessary, or even convenient. A tenant has no right to change the condition of the property, except so far as it is necessary for the purpose of effectuating the object of the demise. In *Doe* d. *Vickery* v. *Jackson*, (*a*), a door-way broken through the wall of the demised premises, was held to be a continuing breach of the covenant to repair. The interest which the tenant takes was considered in *Farrant* v. *Thompson* (*b*), where it was held, that the landlord, who had demised mill machinery, might maintain trover against the sheriff, who had seized it under a fi. fa. against the tenant. In that case Mr. Justice *Bayley* said, "There the goods were parcel of the inheritance, and let to the tenant, to be used during the term in a particular way, viz. in that particular place, and he, by his own act, put an end to that qualified possession." In the case of waste, the materials belong to the person who has the estate of inheritance. Here the act of the defendant was wrongful. The next question is, whether the plaintiff is entitled to retain his verdict. In waste, if damage to a less amount than 40 pence be shewn, judgment is entered for the defendant; and it is said that an action on the case, in the nature of waste, cannot be supported under such circumstances. If the reversionary estate be prejudiced it is a present injury. There is a material difference between an injury to the reversion and an injury to the property. The jury in this case have found

(*a*) 2 Stark. N. P. C. 293. (*b*) 5 B. & A. 826; 2 D. & R. 1.

that no damage was done to the house, but they have not found that no injury was done to the plaintiff's reversionary estate. In *Cole* v. *Green* (*a*), an action was held to be maintainable by reason of the alteration of the thing demised and of the evidence thereof. This is cited merely to shew what took place at the trial of the issue before Lord *Hale*, when it was resolved, that an act which affects the nature of the thing demised, or of the evidence thereof, is waste, notwithstanding any amelioration of the premises. "If a lessee throws down a wall between a parlour and a chamber, whereby he makes the parlour larger, it is waste, because it cannot be intended for the benefit of the lessor; nor is it in the power of the lessee to alter (*à transposer*) the house" (*b*). Here the act done by the tenant amounts to a transposition of the house. Where a house is granted for a long lease, the throwing out of a door may alter the evidence and render it difficult for the reversioner to identify his property. [*Littledale*, J., *Comyns's Digest* (*c*), in citing the case from *Rolle*, says, "if it can be shewn to be an advantage to the lessor, it may come from the other side"]. Where a commoner has brought an action, it has been said, that if the action were not brought, the act complained of would be evidence of title. Where the evidence of title is affected, proof of actual damage is not necessary. In Serjt. *Williams*'s note to 1 *Saunders*, 346 *b*. it is said, that wherever an act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for the invasion of the right, without proof of any specific injury (*d*). If acts of this kind were continued during a long period, in the case of a long lease upon which no rent was

(*a*) 1 Lev. 311.

(*b*) 2 Rolle's Abr. 815, pl. 19.

(*c*) Com. Dig. *Wast*. D. 2.

(*d*) Citing *Patrick* v. *Greenway*, which was trespass for fishing in a several fishery, without alleging that any fish had been caught. The Court of C. P. held, that the act of fishing was not only an infringement of the plaintiff's right, but would, if overlooked, be evidence of right in the defendant; and referring to *Wells* v. *Watling*, 2 W. Black 1233; *Hobson* v. *Todd*, 4 T. R. 71; *Pindar* v. *Wadsworth*, 2 East, 154.

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reserved, the tenant might, at the expiration of the term, allege that he had done a series of acts which a mere lessee has no right to do. The heir of the reversioner might thus lose his estate by acts which a jury might consider as occasioning no actual damage.

Cresswell, contrà. This is a case of great importance and extensive consequences. It would create great alarm if it should be decided that a tenant can make no alteration in the state of the demised premises without subjecting himself to an action. If it had been left to the jury, whether any actual injury had been sustained by the reversionary estate, they would have found that question in the negative, but the learned Judge refused to leave that point to them. *Doe* v. *Jackson* (*a*) is a very strong case, but it was not found there that no damage was done or that the wall was in repair. That was merely a *nisi prius* case, not afterwards moved. The action was founded on the contract to repair. It is not stated that it was properly fitted up with doors, or that the wall was repaired; it is, therefore, difficult to say upon what ground the Court proceeded. In *Farrant* v. *Thompson* (*b*), the defendant had detached part of the freehold and had sold the materials. The plaintiff has treated this, first, as a question of waste; secondly, he says, the present form of action is substituted for the writ of waste, which was first given by the statute of Marlbridge (*c*); but it was given against the tenant, and not against a mere wrong-doer. Lord *Coke* says, where land is on lease, and a stranger commits waste, the landlord shall have waste against the tenant, and the tenant shall have trespass against him who did the waste (*d*). In the *Year Book*, 19*th Hen.* 6, 45 *a* (*e*), it is said (*f*) that if a man enter upon land let to a tenant at will and subverts the land, the tenant at will shall have trespass for the injury done to him, and the les-

(*a*) 2 Stark. N. P. C. 293; *ante*, 48.

(*b*) 5 B. & A. 826; 2 D. & R. 1; *ante*, 48.

(*c*) 52 *Hen.* 3, c. 24.

(*d*) 2 Inst. 146.

(*e*) M. 19 *H.* 6, fol. 45, pl. 94.

(*f*) By *Fortescue*.

sor shall have another action of trespass for the destruction of his land (*a*). In trespass for beating servant *per quod*, the servant may maintain an action without damage, the master not. *Beding field* v. *Onslow* (*b*), is the first case in which an action appears to have been brought by the reversioner. The declaration stated that the plaintiff was seised in fee of a close, and that the defendant stopped a rivulet, which ran between the plaintiff's close and the close of the defendant, whereby the plaintiff's close was drowned (*surround*), and his *trees* perished. The defendant pleaded that one *S.* was possessed of the plaintiff's close by virtue of a lease from plaintiff's father, and that the defendant had paid to *S.*, and that *S.* had accepted, 20*s.* in satisfaction of the trespass. Upon demurrer it was held that this was no plea, and that the plaintiff might sue in respect of the injury done to the reversion. In *Jessor* v. *Gifford* (*c*), it was held, that the reversioner might sue, if the interest would be less valuable if the plaintiff were to sell his reversion during the term, although the injury might possibly be remedied before the expiration of the term. Here it is expressly found that the wall was not weakened by the alteration made; therefore, it would not have been less valuable upon a sale; and unless the property be diminished in value this action is not maintainable, *Jackson* v. *Pesked* (*d*). In that case the evidence of the property was altered quite as much as here. In *Strother* v. *Barr* (*e*), the question immediately before the Court was as to the tenancy. But in delivering his judgment, *Best*, C. J., says, "in order to support an action of this nature there must be some actual damage." *Ferguson* v. *Cristall* (*f*). In *Williams* v. *Morland* (*g*), *Littledale*, J., says, "generally speaking there must be a temporal loss or damage, accruing from the wrongful act of another, to main-

(*a*) "Quod conceditur per totam curiam," M. 19 H. 6, fo. 45, pl. 94.
(*b*) 3 Lev. 209.
(*c*) 4 Burr. 2141.
(*d*) 1 M. & S. 234.
(*e*) 5 Bingh. 153; 2 M. & P. 207.
(*f*) 5 Bingh. 305; 2 M. & P. 524.
(*g*) 4 D. & R. 583, 587; 2 B. & C. 910.

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tain an action on the case." Here there is no injury to the right, nor could any adverse possession be founded upon the act complained of. [*Bayley*, J. The plaintiff's acquiescence in this act might possibly have weakened his evidence as to the right to the other door, which was originally the only door.] In *Comyns's Dig.* tit. *Wast.* D. 2, the cases are stated in which an action of waste may be maintained; but no such imaginary injury as the present is there stated. In *Green* v. *Cole* there had been a total alteration of the demised premises; and there it was said that if the alteration were an improvement it might be shewn on the other side. This proves that such an inquiry might be entered upon. In *The Governors of Harrow School* v. *Alderton* (*a*), it was held, that in an action of waste, the plaintiff is not entitled to judgment where the damages found are merely nominal; upon the authority of which case it has also been held, that the plaintiff cannot have judgment in an action on the case in the nature of waste, where merely nominal damages are found. *Rigg* v. *Parsons* (*b*).

Ingham, in reply. The peculiar hardship attending the judgment in the action of waste has led to the rule, that unless the injury amount to 40 pence, the plaintiff shall not have judgment. *Queen's College* v. *Hallett* (*c*). Injury to the title is sufficient without actual damage. If a series of acts of this nature were done and the title went into the market, it would be found to be less salable. If a tenant may open a door, he may shut up a door. [*Bayley*, J. In *Strother* v. *Barr* (*d*) nothing was determined, except as to the point now before the Court. But it was said that the measure of damages would depend upon the length of the term.]

Cur. adv. vult.

(*a*) 2 B. & P. 87.

(*b*) Cited in *Pindar* v. *Wadsworth*, 2 East, 154.

(*c*) 14 East, 489.

(*d*) 5 Bingh. 136; 2 M. & P. 207; *ante*, 51.

Lord TENTERDEN, C. J., now delivered the judgment of the Court. After stating the facts of the case and the conflicting evidence, his Lordship proceeded thus:—We do not think that we can take upon ourselves affirmatively to say that there was an injury to the plaintiff's right, which would support an action. It might have been left to the jury to say whether there was or was not an injury to the right. Some of the old cases are not very reconcilable to our ideas of justice. One point, however, is intelligible, namely, that if the evidence of the property be altered, the reversioner may maintain an action. We cannot take upon ourselves to say whether in the present case that is so or not. That is a question for the consideration of the jury. There must, therefore, be a new trial, unless the parties will consent to a stet processus.

Rule absolute.

DAVIS *v.* CAPPER, Esq.(*a*)

A warrant of commitment for re-examination for an unreasonable time, as for fourteen days, is wholly void; and *trespass* lies against the committing magistrate, though he acted without any indirect or improper motive.

TRESPASS against the defendant, a magistrate of the county of Gloucester, for assaulting and imprisoning the plaintiff, and detaining her in prison fifteen days. Plea, not guilty; and issue thereon. At the trial before *Gaselee*, J. at the Gloucestershire Summer Assizes, 1828, the case was this:—*Mary Davis*, the plaintiff, had lodged in the house of one *Ann Hamerton*, at Cheltenham; and on the 5th of January, 1828, she made a deposition that she had been robbed of various articles of property, and that some of them had been discovered in the possession of *Ann Hamerton*. The parties appeared before a magistrate, but the charge against *Ann Hamerton* was at that time dismissed. On the 27th of January *Ann Hamerton* sent for one *Russell*, the superintendent of police at Cheltenham, and informed him that she had been robbed while *Mary Davis*

(*a*) See *Davis* v. *Russell*, 2 M. & P. 590; 2 M. & R. Mag. Cas. 226.

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lodged with her. She produced a letter addressed to the plaintiff at her, *Ann Hamerton's*, house, and bearing the London post-mark, stating that she had reason to believe the contents would lead to a discovery of the thief, whom she strongly suspected to be the plaintiff. *Russell* opened the letter, which was signed "*Obadiah*," and purported to be written by an accomplice in the robbery residing in London, who demanded payment of the plaintiff as the perpetrator of the robbery, and stated that he would wait a fortnight for her answer. *Ann Hamerton* also informed *Russell* that four days after the robbery a letter in the same handwriting, and with the London post-mark, had been delivered to the plaintiff, who refused to shew it; and she concluded by requesting *Russell* to take the plaintiff into custody. *Russell* did accordingly apprehend the plaintiff late the same evening, detained her in prison that night, and on the following morning carried her before the defendant. The letter was there produced and read, and *Ann Hamerton* deposed that during the time the plaintiff lodged with her she had lost various articles of bed furniture and wearing apparel, and that she had reason to suspect, and did suspect, that the plaintiff was concerned in the robbery. Upon this information the defendant committed the plaintiff to the Bridewell at Northleach, under a warrant requiring the gaoler to keep her in custody until the 12th of February, and on that day to bring her up for further examination. On the 12th of February the plaintiff was brought up before two other magistrates for further examination, and was by them re-committed. On the 16th she was again brought up before the defendant, who then discharged her, stating that there was no evidence against her, that he would have discharged her on the 12th if he had been present at the examination, and that he had committed her in the first instance until the 12th under the expectation that she would by that time have explained the history and circumstances of the letter. No evidence was produced on the part of the defendant, but it was contended

that the action could not be maintained on two grounds: first, that the defendant had done nothing illegal, every magistrate having a discretionary power to commit for further examination for such period as he thinks proper; and, secondly, that even if he had abused his discretionary power, and thereby acted illegally, case, and not trespass, was the proper form of action. The learned judge inclined to think that the action was not maintainable, but to save the expense of another trial he left two questions to the jury: first, whether the commitment was made bonâ fide for the purpose of further examination, or for the purpose of compelling the plaintiff to state who was the writer of the letter; and, secondly, whether they considered the time for which the plaintiff had been committed was a reasonable time. The jury retired, and, after an absence of several hours, returned stating that they could not agree; whereupon the learned judge discharged them from giving any verdict and nonsuited the plaintiff. In Michaelmas term, 1828, a rule nisi for a new trial was granted, upon the grounds, first, that there was evidence to go to the jury that the commitment was made for the purpose of extorting a confession, and not for the purpose of further examination, and therefore was illegal; and, secondly, that even if the commitment was made bonâ fide for the purpose of further examination, it was made for an unreasonable time, and therefore was illegal. In Hilary term, 1829,

Taunton shewed cause against the rule. This nonsuit was right, for the form of action was wrong. Assuming that there was evidence from which it might be implied that the defendant acted maliciously in committing the plaintiff, the form of action should have been case, and not trespass. If the defendant had jurisdiction over the subject-matter of the complaint, and the warrant is good upon the face of it, trespass is not maintainable; because the foundation of that action is, that the defendant had no jurisdiction, but was a mere wrong-doer. The defendant here clearly had jurisdiction, for a complaint was made

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upon oath before him, and a felony charged. [*Bayley*, J. The complainant only swore that she had reason to suspect, and did suspect, that the plaintiff was concerned in the felony. Such a deposition would justify the apprehension of the party, but I doubt whether it justified her committal. Besides, is fourteen days a reasonable time for which to commit for further examination?] It may or may not be so, according to the circumstances. Generally speaking, the time for which a prisoner shall be committed for further examination is a matter in the discretion of the magistrate, and that discretion, exercised bonâ fide, is conclusive. But even if that be not so, still, if under any circumstances the warrant can be good, it is an answer to the action. A fortnight may be too long, but it is not necessarily so. Here the letter produced before the defendant spoke of a fortnight; he may have considered that letter as genuine, and believed that the writer would wait a fortnight; and upon that ground may have committed the plaintiff for that time for further examination. *Scavage* v. *Tateham* (*a*) may be relied on for the plaintiff, but that was a very different case from the present. There the magistrate detained the prisoner in custody in his own house; the detention was for the space of *nineteen* days; and it did not appear that there had been any examination at all.

Curwood, contrà, was stopped by the Court.

BAYLEY, J.—I am of opinion that the rule for a new trial ought to be made absolute. Upon one question I entertain no doubt; it is clear that a magistrate may legally commit for further examination. But I think it equally clear that it should have been left to the jury to say whether the commitment was made bonâ fide for the purpose of further examination, or for the purpose of inducing the plaintiff to make a confession. The declaration of the defendant, that he had committed the plaintiff in the first instance until the 12th, under the expectation that she

(*a*) Cro. Eliz. 829.

would by that time state who was the writer of the letter, was certainly evidence to go to the jury that he did not commit for the purpose of further examination. Upon the other ground, the authorities are very strong to shew that a magistrate ought not arbitrarily to commit, even for the purpose of further examination, for so long a period as the defendant in this case did. The duty of magistrates in this respect is pointed out in *Hale's Pleas of the Crown* (*a*), and is this:—Where a party arrested for felony is taken before a magistrate, he must discharge, or commit, or bail him. But prior to so doing he must, by 1 and 2 *Ph. & M.* c. 13, and 2 and 3 *Ph. & M.* c. 10 (*b*), (re-enacted by 7 *Geo.* 4, c. 64,) take the informations upon oath of the prosecutor and witnesses, and put them into writing. He must also take the examination of the prisoner, not upon oath, and put that into writing. And because it may be unreasonable to take these informations or examinations presently, or possibly it may take longer time, the prisoner may be continued in the custody of the officer, or may be detained in the magistrate's house, or committed to some near safe place of custody, till the examination can be taken: but this must be dispatched in some convenient time. The case of *Scavage* v. *Tateham* (*c*) is there referred to. That was an action for false imprisonment in London from the 10th to the 29th of September. The defendant justified, that he was mayor and justice of the peace in Pomfret, and that robbery was done there, and the plaintiff was thereof suspected and brought before him, and therefore he detained him in his house during that time to examine him and one *Pole*, who was not apprehended, concerning the robbery; and afterwards, on the 29th of September, delivered him over to the new mayor; and traversed the imprisonment in London. And upon demurrer it was adjudged that the inducement to the traverse was not good; for a justice of peace cannot detain a person suspected in prison, but during a convenient time only to examine him,

(*a*) Vol. I. p. 586; II. p. 120. (*c*) Cro. Eliz. 829.
(*b*) *Ante*, iv. 437 (*b*).

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which the law intends to be *three* days, and within that time to take his examination and send him to prison, for he ought not to detain him as long as he pleaseth, as he did, eighteen days. That decision, if adopted as an authority to its full extent, would shew that the law has limited the reasonable time to *three* days. But I am not disposed to go to that length. I do not think it possible to fix any specific limit. The time for which a party may reasonably be committed for further examination must depend upon the nature and circumstances of the case. But then these circumstances ought to be detailed in evidence. They should have been detailed in evidence in this case. Then, if the question had proved a mere question of law, the judge should have determined it; if a mixed question of law and fact, the judge and the jury should have determined it. In *Burn's Justice*, vol. i. p. 1009, 24th ed. n. there is this case (*a*):—*Gooding* was convicted at the London Sessions, in May, 1820, of assisting *Davis* to escape from the Giltspur Street counter, where he had been in custody, charged with forgery. The case was afterwards submitted by his majesty to the judges, in consequence of a petition presented by *Gooding*, alleging that *Davis* was never in *legal* custody, and submitting that *Gooding*, therefore, could not legally be convicted of assisting him to escape. The fact was, that *Davis*, at the time of his escape, was under commitment for further examination only, and that no warrant, commitment, or any written authority was ever made out by the committing magistrate, or by any other magistrate. The only question submitted to the judges was, whether a commitment for further examination, not being in writing, was legal. The judges were unanimously of opinion that such a commitment, if made for a reasonable time, was legal, though not in writing; but they stated that they considered the question,

(*a*) Cited by *Park*, J. in his charge to the grand jury, Monmouth Summer Assizes, 1823, *Chitty's Burn's Justice*, vol. ii. p. 100, n.

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what was a reasonable time, to be a mixed question of law and fact; and that as the facts of the case were not fully detailed, they could form no opinion, in point of fact, whether the time in the particular case was a reasonable time or not; but that they presumed it must have been proved at the trial to be so, because otherwise the prisoner ought to have been acquitted. That statement of the judges shews them to have been of opinion, that the question whether the time, for which the party was committed for further examination, was reasonable or not, depended upon the circumstances of the case, and that the judgment of the committing magistrate was not conclusive of that question. I feel myself bound to act up to that opinion in the present case, and to state, that the circumstances which induced this defendant to commit the plaintiff for fourteen days not being detailed, I feel myself unable to say whether that time was a reasonable time of commitment for further examination or not. Upon this view of the case, upon both grounds, I am of opinion that justice cannot be done without a new trial being had.

LITTLEDALE, J.—I also think that there ought to be a new trial in this case, for the purpose of trying the question, whether the plaintiff was committed by the defendant really and bonâ fide for the purpose of further examination, or for the purpose of forcing from her a confession regarding the person who wrote the intercepted letter. If the commitment was made for the latter purpose it is quite clear that it was illegal. Upon the question of the discretionary power of magistrates, as to the time for which they can legally commit for further examination, I should require opportunity for consideration before I came to any decision; but it is not necessary to decide that question in the present case.

PARKE, J.—I am also of opinion that there must be a new trial had in this case, for the reason given by my brother

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Littledale. Upon the other point I agree with my brother *Bayley*, that it is a mixed question of law and fact for the consideration of the jury, after a detail of all the circumstances, whether the time of commitment for further examination is reasonable or not. The case of *Scavage* v. *Tateham* (*a*), in whatever view regarded, seems to me to establish that proposition; because, though the decision there may have proceeded on the ground that the prisoner had been improperly detained in the magistrate's house instead of being committed to prison, or that he had been improperly delivered over to the new mayor without any examination having taken place, still it appears from the report rather to have proceeded upon the ground that a magistrate has no authority to detain a suspected person in custody beyond a reasonable time for the purpose of his examination: and it is clear that Lord *Hale* takes that view of the decision in the part of his treatise referred to by my brother *Bayley*. So, in *Gooding's* case (*b*), it is clear that the judges thought the time for which the magistrate had detained the party in custody was not to be considered conclusively as reasonable; but that the reasonableness of the time was a mixed question of law and fact, to be determined by the judge and jury. A new trial, therefore, must be had; which, if there be any doubt upon this point, will give the defendant the opportunity of raising the question upon the record.

Rule absolute for a new trial.

At the Gloucestershire Summer Assizes, 1829, the cause was tried again before *Vaughan* B., upon the same evidence as before. That learned judge left two questions to the jury: first, whether the defendant in committing the plaintiff for the time mentioned in the warrant acted bonâ fide, or was influenced by some indirect or improper motive; and secondly, if they thought that the commitment was

(*a*) *Ante*, 57. (*b*) *Ante*, 58.

made bonâ fide for the purpose of further examination, whether the time was reasonable: and his lordship expressed his own opinion that the time was, under the circumstances, unreasonable. The jury found that the commitment was made bonâ fide for the purpose of further examination only, but that it was made for an unreasonable time, and returned a verdict for the plaintiff with 10*l.* damages. The learned judge gave the defendant leave to move to enter a nonsuit, if the Court should be of opinion that trespass was not maintainable for an unreasonable commitment made without any indirect or improper motive. On a former day in this term

Taunton moved accordingly. Had the defendant acted wholly without jurisdiction, and shewn his want of jurisdiction upon the face of his warrant of commitment, trespass would have been maintainable; but he had jurisdiction to commit, and his warrant was good upon the face of it; therefore trespass will not lie. This distinction is taken in the late case of *Groome* v. *Forrester* (*a*). Lord *Hale*, speaking of commitment in cases of felony, says (*b*), "The want of certainty seems not to make the commitment absolutely void, so as to subject the gaoler to a false imprisonment, but it lies in averment to excuse the gaoler or officer, that the matter was for felony." Here, the defendant having jurisdiction to commit for a reasonable time, and the reasonableness of the time being a mixed question of law and fact, (the law having assigned no fixed limit,) it is impossible to say when precisely the time became unreasonable, and the want of jurisdiction arose. The defendant, therefore, at most, has fallen into an irregularity in the exercise of his jurisdiction; and though that may render him liable to an action on the case, still, having had jurisdiction, he cannot be treated as a trespasser (*c*). It may be doubted whether the plaintiff would have been entitled to her dis-

(*a*) 5 M. & S. 314.
(*b*) Hale's P. C. 583.
(*c*) Vide *Basten* v. *Carew*, 5 D. & R. 558; 3 B. & C. 649.

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charge by habeas corpus; and trespass does not lie unless the commitment be so utterly void as to entitle the party committed to be discharged by habeas corpus, although the converse of the proposition does not hold; for a party may be entitled to discharge by habeas corpus, and not entitled to maintain trespass for false imprisonment. [*Bayley*, J. May not a warrant of commitment be good for part of the time, and bad for the residue?] Not so as to make the magistrate a trespasser. It is impossible to draw the line. Besides, here no part was bad. It was a mere irregularity. [*Parke*, J. *Gooding*'s case (*a*), shews that a commitment for an unreasonable time is void altogether. Lord *Tenterden*, C. J. Suppose a magistrate had authority by statute to commit for one month, and he committed for two, would not trespass lie against him?] Undoubtedly it would, because the law having limited his jurisdiction to a month, the commitment would be void for the second month, in respect of which he would be wholly without jurisdiction. Here the magistrate had jurisdiction to commit for a reasonable time, without any express limitation; and there is nothing upon the face of the warrant to shew that the time for which he committed was unreasonable.

Cur. adv. vult.

Lord TENTERDEN, C. J. now delivered judgment.—This was an action of trespass brought against the defendant, a magistrate, who had committed the plaintiff for a period of fourteen days for the purpose of further examination. The jury found that the commitment was made bonâ fide for that purpose, and without any indirect or improper motive, but that the time for which it was made was unreasonable. It was contended on the part of the defendant that the form of the action was improper, that it should have been case and not trespass. We are, however, of opinion that trespass was the proper form of action. A special action on the

(*a*) 1 Burn's J. 1009, 24th ed.; 2 Chitty's Burn's J. 100, n.

case cannot be maintained against a magistrate for anything done by him in that capacity, unless his conduct have been influenced by some improper motive, and here the jury expressly negatived such a motive. And whether we consider this commitment as absolutely void from the beginning, as being for an unreasonable time, or consider it as void only pro tanto, that is, for so much of the time as was unreasonable, still an action of trespass would be maintainable; because the legal character of the act is the same, and every continuance of the party in custody is a new imprisonment and a new trespass. It appears to us, however, to be the far better opinion that, in a case like this, where the time is unreasonable, the commitment is void from the beginning (*a*). The duty of a magistrate is to commit for a reasonable time, and if he commit for an unreasonable time, he thereby does an act which he is not authorised by law to do. It is clear that in *Gooding*'s case (*b*) the judges thought that a commitment for an unreasonable time would be a void commitment; for the report states, that they presumed that it must have been proved at the trial that the time was reasonable, because otherwise the prisoner ought to have been acquitted. That goes to the very point, that a commitment for further examination, if it be for an unreasonable time, is, therefore, wholly void, because the judges were of opinion that the party so committed was not in legal custody, and, therefore, that another person who had aided him to escape from prison was not guilty of any offence against the law. For this reason, as well as for the other which I have already stated, we are of opinion that trespass was the proper form of action in this case.

Rule refused (*c*).

(*a*) And see *Rex* v. *Ellis*, 8 D. & R. 173.

(*b*) 1 Burn's J. 1009, 24th ed.; 2 Chitty's Burn's J. 100, n.; *ante*, 58.

(*c*) And see *Hardy* v. *Ryle*, *ante*, iv. 295; 9 B. & C. 603.

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NEWSOME *v.* GRAHAM and another.

Rent paid by *A.* to *B.*, claiming as devisee, the amount of which *A.* is afterwards compelled to pay to the heir, may be recovered back by *A.* as money had and received to his use, *B.* setting up no title to the lands when the action is brought, or at the trial.

ASSUMPSIT for money had and received. Plea, non assumpsit; and issue thereon. At the trial before *Bayley*, J., at the last Yorkshire Assizes, the case was this:—*W. D. Taylor* died in 1819, intestate, and without issue, possessed of certain freehold estates. *J. Taylor*, his younger brother, succeeded to the estates as heir at law, excluding the daughter of *R. Taylor*, an elder brother, who was supposed to have been illegitimate. *J. Taylor* died in 1820, having by will duly devised the estates to the defendants as trustees. The plaintiff had been tenant of part of the property under *W. D. Taylor* and under *J. Taylor*, and after the death of the latter continued to hold under the defendants, and paid them rent for seven or eight years. It was then discovered that *R. Taylor*, the elder brother, had been legitimate, upon which his daughter and heiress at law brought ejectment against the plaintiff, and obtained a verdict establishing her title. She afterwards brought an action for mesne profits against the plaintiff, and obtained a verdict for the amount of six years' rent. The plaintiff then brought the present action to recover that amount, together with the costs of his defence. The present defendants knew, while they were in the receipt of rent from the plaintiff, that there were doubts respecting the illegitimacy of the elder brother. It was contended on the part of the defendants that the action for money had and received could not be maintained, because the title to the estates might have come in question, which could not have been tried in that form of action. The learned judge directed the jury to find a verdict for the plaintiff, but gave the defendants leave to move to enter a nonsuit. The jury having found for the plaintiff,

F. Pollock, on a former day in this term, moved accordingly. The title to the estates might have come in question, therefore this action cannot be maintained; for title to

land, or to an incorporeal hereditament, cannot be tried in an action for money had and received: *Cunningham* v. *Lawrents* (*a*), *Lindon* v. *Hooper* (*b*). The plaintiff claims the money as rent paid without consideration. The ground of the claim is, that the trustees had no title. But it was open to them to shew that they had title, for the recovery in ejectment is not conclusive of that question; this action therefore might have turned upon a question of title, and cannot be maintained as an action for money had and received.

Cur. adv. vult.

Lord TENTERDEN, C. J. now delivered judgment.—We are all clearly of opinion that the action for money had and received is maintainable under the circumstances of this case. They are these:—The plaintiff had from time to time paid rent to the defendants for certain premises which he held of them. It turned out at length that the defendants had no title to those premises. The plaintiff was ejected, and compelled to pay the mesne profits for the time during which he had held of the defendants. And this action was brought to recover back the rent which he had paid to them. The objection was, that title to land could not be tried in an action for money had and received. That is true; but there was no trial of title in this case. It had been previously ascertained that the defendants had no title whatever to the premises; and the defendants did not, at the trial of this cause, claim to have any title. Two cases were cited at the bar, but they are both distinguishable from the present in that respect. From the short note of the nisi prius case of *Cunningham* v. *Lawrents* (*a*) in *Bacon's Abridgment*, it may be inferred that the defendant claimed title to the land at the very time when the action of assumpsit for the rents received was brought. In *Lindon* v. *Hooper* (*b*), the right of common was in dis-

(*a*) 1 Bac. Abr. 7th ed. 260. (*b*) Cowp. 414.

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pute at the time when the action for money had and received was brought to recover back the money paid for the release of the cattle; the defendant, who had distrained the plaintiff's cattle, agreed to return the money, if the plaintiff should make out his right, and the action was brought for the express purpose of trying the right. In the present case it did not appear that the defendants, either at the time when the action was brought, or at the trial of the cause, claimed to have any title to the premises. This, therefore, is the simple case of money paid under a mistake as to the facts, and falls within the general rule that money so paid may be recovered back as money had and received by the defendants to the plaintiff's use.

Rule refused.

LEWIS and another *v.* MARLING.

A patent is not avoided by the specification claiming as part, but not as a necessary part of the invention, something which proves to be useless.

A patent for a machine invented, and first brought into use, by the patentee, is not avoided by evidence of a similar machine having been previously invented by another, by whom it was never brought into use in this country.

CASE, for infringing a patent obtained by the plaintiffs for improved shearing machines for shearing woollen cloths. Plea, not guilty; and issue thereon. At the trial before Lord *Tenterden*, C. J., at the adjourned Middlesex sittings after the last term, the case was this:—The plaintiffs had obtained their patent in 1818, and in their specification, to which a drawing was annexed, they claimed as their invention, among other things, "thirdly, the application of a proper substance fixed on or in the cylinder A. to brush the surface of the cloth to be shorn;" and "fourthly, the described method of shearing cloth across from list to list by a rotatory cutter." It appeared that the brush was soon abandoned by the plaintiffs, being found useless, and that they never sold any machines with it; and upon this ground it was contended that they had claimed too much, and therefore that the patent was void. With respect to the rotatory cutter, it appeared that a similar machine was in

use in America twenty years ago, and that a specification of it was sent to England in 1811 and seen by several persons, though no machine was ever constructed by it; that in 1816 a model of a similar machine was brought to England from America, and seen by some few persons, though no machine was ever constructed by it, nor was its existence publicly or generally known; and that about thirty years ago a similar machine was constructed in England, and tried by the defendant, who did not find it answer. Upon this evidence it was contended that the invention claimed by the plaintiffs was not new, and therefore that the patent was void. The Lord Chief Justice was of opinion, upon the first point, that as the specification did not describe the brush as a necessary part of the machine, the patent was still good, although, upon trial, that part of the machine had proved useless; and, upon the second point, that as the rotatory cutter had not been publicly or generally used or known in England, the plaintiffs must still be considered as the inventors within the meaning of the statute 21 *Jac.* 1, c. 3, s. 6, although a specification and model of it had been brought from America, and a similar machine had been constructed in England; but his lordship left it to the jury to say whether a similar machine had been generally known in England, and whether the patent of the plaintiffs had been infringed by the defendant. The jury found a verdict for the plaintiffs.

F. Pollock now moved for a rule nisi for a new trial, and renewed the objections taken at Nisi Prius. First, the patent is void, because the specification describes as part of the invention of the plaintiffs, the application of a brush to brush the surface of the cloth; whereas it was proved that such brush was useless, and that the plaintiffs never sold a single machine with the brush attached to it. Now a patent is void if the specification is either ambiguous or gives directions tending to mislead the public, *Turner* v. *Winter* (*a*);

(*a*) 1 T. R. 608.

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and here the public would be misled, if, at the expiration of the time for which the patent was granted, they attempted to construct a machine according to the directions of the specification. It was suggested at the trial, as an answer to this objection, that the specification does not describe the brush as a necessary part of the machine. But this seems to be no good answer in law, because the defendant is entitled to treat the case as if the patent had been obtained for the brush alone; and because in every patent, all that is claimed must be new and useful, or the patent is void: *Hill* v. *Thompson* (*a*), *Brunton* v. *Hawkes* (*b*), *Crompton* v. *Ibbotson* (*c*). Secondly, the patent was void because part of the invention claimed, namely, the rotatory cutter, was proved not to be new; at least there was strong evidence upon that subject, and which was not left to the jury by the lord chief justice in the manner warranted by former decisions. The evidence was this:—About thirty years ago a similar machine was constructed in England; in 1811 a specification, and in 1816 a model, of a similar machine was brought to England from America, and though no machine was ever constructed from either, both were seen by several persons. Now the proprietor of that specification or model could not, after having so exhibited it, have maintained a patent for the machine; and if he could not, it is difficult to understand why the plaintiffs should be in a better situation.

Lord TENTERDEN, C. J.—I am of opinion that we ought not to grant a rule to disturb the verdict in this case. With respect to the first objection, it does not appear, upon adverting to the specification, that the patentees described the brush as a necessary part of the machine, although they claimed it as an invention. Before they applied for the patent they had constructed a machine, of which the brush formed a part, but before they made any machines for sale

(*a*) 2 Moore, 424; 8 Taunt. 375.
(*b*) 4 B. & A. 541.
(*c*) 1 Danson and Lloyd, 33.

they discovered the brush to be unnecessary, and abandoned it. I agree that if a patentee insert in his specification, as a necessary ingredient in the patent article, any thing which proves not to be necessary, or even useful, and thereby misleads the public, his patent may be void; but I think it would be too much to say that this patent is void, because the plaintiffs claim to be the inventors of a particular part of the machine, not described in their specification as necessary, and which turns out not to be useful. Several of the cases already decided have borne with sufficient rigour upon patentees, but no case has yet gone the length of deciding that such a claim renders the patent void, and I, for one, am not disposed to create such a precedent. The other ground of this motion was an alleged misdirection on my part to the jury. With a view to impugn the novelty of the invention, evidence was given that a machine similar to that of the plaintiffs had been previously constructed in England, but that it had not been approved of, and never came into use. Another piece of evidence was, that a model had been brought to England from America, and exhibited to some few persons, but that no machine had ever been made from it. It was further proved, that a specification had been brought to England from America, and shewn to several persons, but that no machine was ever made from it. So that upon the result of all the evidence it appeared, that until the plaintiffs obtained the patent for their machine, no similar machine had been publicly known or used in this country. I told the jury, that if it had been proved that the plaintiffs had seen the former model or specification, that might have been an answer to their claim to the invention, but that there was no evidence of that kind; and I left it to them to say whether a machine similar to that of the plaintiffs had been in public use and operation before the patent was granted. They found that there had not; and I think there is no reason to find fault with their verdict.

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BAYLEY, J.—I am of the same opinion. In order to support a patent, the specification must make a full and fair disclosure to the public of all that is known to the patentee respecting his invention; the object being, that ultimately the public shall have the benefit of the discovery (*a*). If, therefore, the patentee represent several things as competent to produce a specific effect, when only one will answer, that is bad; or if he suppress any thing which he knows will answer, that is bad also. It is objected in this case that the plaintiffs described the application of a brush as a part of their invention. But at the time when the specification was made a brush was used; and there is no reason to doubt that the plaintiffs at that time thought it necessary; therefore that objection fails. As to the specification and model sent over from America, if it had been proved that the plaintiffs had seen them, or either of them, they could not afterwards have claimed the discovery. But if I discover a particular thing for myself, it is no objection to my claim to a patent that another has made the same discovery, provided I am the first to introduce it to public notice and adoption. Here, there was no ground to doubt that the plaintiffs were the inventors, if not the first inventors, of the machine, and that they were the first persons who introduced it to public notice.

PARKE, J.—I am also of the same opinion. The objection to the patent, as explained by the specification, is, that it is for several things, one of which was then supposed to be useful, and is now found to be not so. Now although it has been decided that all the parts of an invention for which a patent has been granted must be new, it has never been decided that they must all continue to be useful. The law has not yet gone to that extent, nor do I think it desirable that it should. The prerogative of the crown as to granting patents was restrained by the statute

(*a*) *Liardet* v. *Johnson*, Bull. N. P. 76, b.; Godson on Patents, 121.

21 *Jac.* 1, c. 3, s. 6, "to the true and first inventors of manufactures, which others at the time of granting the patent shall not use." The condition, therefore, is, that the thing shall be new, not that it shall be useful; and though the question of utility has been sometimes left to the jury, it appears to me that the condition imposed by the statute is complied with, if the subject-matter of the patent be proved to be new. There was nothing in this case to shew that the plaintiffs were not the first inventors of this machine, at least in England; and its having been previously invented in America, does not affect the question. It is a further part of the condition of the statute, that the manufacture shall not have been used by others; which, it is said, has not been complied with in the present case. But there was no evidence of the user of this machine in England before the plaintiffs obtained their patent; and there is no authority for saying that a patentee is to lose the benefit of his invention because it has been also invented by another, unless that other has also brought it into public use. For these reasons I am of opinion that neither of the objections urged against this patent ought to prevail, and that the plaintiffs are entitled to retain the verdict which has been found in their favour.

Rule refused (*a*).

(*a*) *Littledale*, J., was in the Bail Court.

SHARP *v.* ASPINALL and PARKER.

The proceedings upon the complaint of a member of a friendly society under 49 *Geo.* 3, c. 125, s. 3, must be *all* before two justices resident in the county in which the society is held.

DECLARATION in trespass. The first count stated that defendants, being justices of the county of York, unlawfully issued their warrant to the constable of Slaidburn, authorizing him to levy the sum of 7*s.* 6*d.* by distress and sale of the goods, chattels and moneys, of a certain

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friendly society called The Humane Charitable Fraternity, held at Slaidburn in the West Riding of the county of York, and in default of such distress being found, then to levy the said sum of 7*s.* 6*d.* by distress and sale of the goods, &c. of plaintiff, therein described as an officer of the said society; under which warrant defendants with force and arms broke and entered the house of plaintiff in the said county, and took away a writing desk of plaintiff of the value of 10*l.* and sold it, although defendants had no jurisdiction over the subject-matter of the complaint on which the warrant was grounded, and had no right to issue the warrant. Second count for breaking and entering plaintiff's house, and taking away his goods. Third count for taking away plaintiff's goods. Pleas: first, not guilty. Secondly, that before and at and after the said time when &c., one *A.* was a member of the said friendly society, held &c., called &c., the rules, orders, and regulations whereof had been and were, before &c., duly exhibited, confirmed and filed at the general quarter sessions of the peace in and for the said West Riding, according to the provisions of the statute 33 *Geo.* 3; and the said *A.* so being such member &c., did before &c., complain to defendant *Parker,* being then and there a justice of the peace for the said west riding, *and residing within the same,* and also a justice of the peace for the county palatine of Lancaster, the said county palatine adjoining the said West Riding, of relief having been refused to him the said *A.* by the said society, to which he was lawfully entitled; that a summons was issued to plaintiff as steward of the said society; that defendant *Parker* being such justice as aforesaid, and defendant *Aspinall* being a justice of the peace for the said West Riding, and also for the said county palatine, *and residing in the said county palatine,* near to *S.*, attended at the time and place mentioned in the summons; that plaintiff made default; whereupon service of the notice was proved on oath, and defendants proceeded to hear the complaint, and made an order that the said sum of

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7*s.* 6*d.* should be paid to *A.*; and because plaintiff refused to pay, defendants issued their warrant, &c. Replication, de injuriâ suâ, &c. At the trial before *Bayley*, J. at the last York assizes, the facts were proved as stated on the record. It was contended on the part of the plaintiff that the defendants, not being both resident in the West Riding, had no jurisdiction to make the order upon which the warrant was founded, inasmuch as the statute 49 *Geo.* 3, c. 125, s. 1, confined the power of making such orders to two justices "residing within the county, riding, division, &c., within which such society shall be held." On the part of the defendants it was contended, that the clause of the statute referred to was only directory, and that the order being made by two justices of the West Riding, though not both of them resident within it, was good, inasmuch as the statute 28 *Geo.* 3, c. 49, empowered justices to act for any two adjoining counties, provided they were personally resident within one of them. The learned judge was of opinion that the defendants had no jurisdiction to make the order, and directed the jury to find a verdict for the plaintiff, but gave the defendants leave to move to enter a nonsuit.

Wightman now moved accordingly. It was assumed at the trial that the order in question was made under the authority of the *first* section of the 49 *Geo.* 3, c. 125, and the objection was founded upon that assumption. Now that was a mistake, for the whole of the proceedings were taken under the *third* section of that statute, which, as regards the present question, is essentially different from the first. The powers given by the first section are, no doubt, confined to justices residing within the county in which the society is held; for the words "such justices" in the latter parts of that section can only refer to the justices there first mentioned, namely, resident justices; and if the proceedings had been taken under that section, it may be

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admitted that the objection would have been fatal, notwithstanding the statute 28 *Geo.* 3, c. 49. But the subject-matter of these proceedings was *relief*, a word not to be found in the first section, and the whole scope and object of the two sections differ; for the first empowers justices to enforce the obedience of the members to the rules of the society, and the third empowers them to give relief to the members of the society against the misconduct of the officers. The third section begins by enacting that "if complaint shall be made to two *such justices* by a member of relief having been refused, it shall be lawful for the *said two justices residing within the county in which the society shall be held*, and *such justices* are thereby required, to summon the officer against whom complaint shall be made, and, upon his appearance, &c., *such justices* shall proceed," &c. Now the words "such justices" in the beginning of this section cannot be taken to refer to the justices mentioned in the first section, because there is an intervening section, the second, which contains a long recital of two prior statutes, introduces a new set of enactments wholly independent of the first section, and twice mentions "justices," generally, without any definite description. Then, taking the words "such justices" in the third section to refer to the last antecedent justices, namely, those mentioned in the second section, which is the proper rule of construction, the complaint of relief being refused may be made to *any* justices, who would have jurisdiction wherever resident; and the subsequent words in the third section, respecting residence, must be considered as directory only, and not restrictive. At all events those words, even if considered as restrictive, can apply only to the granting of the summons; and as the summons in this case was granted by the resident justice, the proceedings will still be valid by the 3 *Geo.* 4, c. 23, s. 2, which provides, "that in all cases where two justices are authorized and required to hear and determine any complaint, one justice shall be

competent to receive the original information or complaint, and to issue the summons or warrant requiring the parties to appear before two justices; and after examination upon oath into the merits of the complaint, and the adjudication thereupon by any such two justices being made, all subsequent proceedings to enforce obedience thereto may be enforced by either of the said justices, or any other justice for the same county."

Lord TENTERDEN, C. J.—I entertain no doubt upon this case; the point is perfectly clear. The proceeding is under the third section of the statute 49 *Geo.* 3, c. 125. The early part of that section provides, that if complaint shall be made of relief being refused, two justices *residing within the county in which the society is held,* shall summon the party complained against; and the latter part directs all the subsequent proceedings to be taken before *such justices.* The word *such* can only mean *resident;* if the first proceeding is to be before two resident justices, the order must be made by them also. The direction of the learned judge, therefore, was perfectly correct, and no rule can be granted.

The other Judges concurred.

Rule refused (*a*)

(*a*) A friendly society, whose rules have been allowed by the magistrates and registered in London, afterwards hold their meetings in Middlesex. The magistrates of Middlesex have jurisdiction to decide upon complaints made by members of the society. So held upon an indictment for disobedience to an order of two justices of Middlesex. *Rex* v. *Gash,* 1 Stark. N. P. C. 441; Mann. N. P. Digest, 2d ed. 209.

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CHRISTOPHER KELL, Gent., one, &c. *v.* NAINBY.

An attorney carrying on business under the firm of "*K.* and Son," his son not being in fact his partner, may sue alone for the amount of his bill for professional business done.

ASSUMPSIT on an attorney's bill. At the trial before *Gaselee*, J., at the last Sussex assizes, the case was this:—The business, in respect of which the action was brought, was done by the plaintiff for the defendant in the years 1827 and 1828. *William Kell*, the plaintiff's son, who proved the business done, stated, upon cross-examination, that he was not in partnership with his father, but acted as his clerk, and received a salary. But he admitted that "*Kell* and Son" was on the door of his father's office, and that letters relating to the business had passed between the parties addressed and signed, respectively, "*Kell* and Son." It was thereupon contended that the son ought to have been made a co-plaintiff with his father. The learned judge told the jury, that if the action had been brought by the defendant against the plaintiff and his son jointly, either for a debt or for negligence, the evidence would have been sufficient to charge the son, because he had permitted himself to be held out to the world as a partner with his father. But as the action was brought by the plaintiff as a creditor of the defendant, it was perfectly immaterial to the debtor that the son had been held out to the world as a partner, if in fact he was not so, and had no claim upon the defendant. The son had sworn that he was not a partner with his father at the time the business was done, and if they believed his evidence, the plaintiff was entitled to a verdict. The jury found a verdict for the plaintiff.

Platt now moved for a new trial. The question that should have been left to the jury was, not whether they believed the statement of the son that he was not a partner with the plaintiff, but whether they believed, upon the whole evidence, that the plaintiff and his son were jointly employed by the defendant. The evidence was very strong to shew a joint employment of the father and son. It might be true that they were not, strictly speaking, partners,

and yet they might be jointly employed by the defendant; and if they were so, no private arrangement made between themselves could alter the nature and effect of that employment. That employment formed the contract between the parties, and the son was as much a party to it as the father: the fact that they were not jointly interested in the profits made no difference, if they were jointly employed to do the business. The defendant addressed letters to the two as partners; he received letters representing them as partners; he never had any reason to doubt that they were partners. It is clear that the two would have been jointly liable to the defendant in an action for negligence, and that shews that the employment must have been joint. This case is not like that of partners in a mercantile establishment.

Lord TENTERDEN, C. J.—I think the question left to the jury was the right one, and that if they believed the son, the plaintiff was entitled to a verdict. If the son spoke truth, there was no partnership between him and the plaintiff. The son, by permitting himself to be represented as a partner with his father, may have rendered himself jointly liable with his father in an action for negligence; but it by no means follows from thence that he was bound to sue jointly with his father, when he claimed no interest as a partner, and declared that in fact he was not one.

LITTLEDALE, J., concurred.

PARKE, J.—The person with whom a contract is actually made, may sue upon it without joining others with whom it is apparently made. They may be liable, as partners, to all the responsibility attached to persons holding themselves out in that character (*a*); but they are not bound to join in an action from which they seek no benefit, and from which they declare that they are not entitled to receive any.

(*a*) S. P. *Guidon* v. *Robson*, 2 Campb. N. P. C. 302.

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There was no evidence in this case to shew that the son was actually employed by the defendant. The son proved that he was not an actual partner; and although he may have appeared to the defendant to be a partner, unless he was a party to the contract for a breach of which the action was brought, he was not bound to join in that action (*a*). There was no evidence to shew that he was a party to that contract.

Rule refused (*b*).

(*a*) Acc. *Teed* v. *Elworthy*, 14 East, 234.

(*b*) See *Gow on Partnership*, 125—130, 3d ed.

DAVIES and others *v.* The KING (in error).

An indictment charging that *A.* and others, on, &c. at, &c. to the number of three together, did by night unlawfully enter divers closes, and were *then and there* in the said closes, armed with guns, for the purpose of destroying game, does not sufficiently allege that the defendants were *by night* in the closes, armed, for the purpose of destroying game.

THIS was an indictment for poaching. The first three counts were founded on the statute 57 *Geo.* 3, c. 90, which proved to have been repealed before the alleged offence was committed; they were, therefore, abandoned. The fourth count, the only one now relied on, stated, "that *Davies* and others, (naming them,) with force and arms, on the 17th day of December, in the year aforesaid, at the parish of Whitegate, in the county of Chester, being to the number of three or more persons together, did, by night, unlawfully enter divers closes and inclosed lands there situate, and being in the occupation of the said *E. C.*, and were then and there in the said closes and lands, armed with guns and other offensive weapons, for the purpose of then and there taking and destroying game, against the form of the statute." At the trial before *Jervis*, J., at the last Spring Assizes for Chester, the defendants were convicted upon this count, and sentenced to fourteen years' transportation. A writ of error was afterwards brought, which now came on for argument.

J. Jervis, for the plaintiffs in error. The fourth count is bad in various particulars. The offence charged being

one created by statute, all the particular circumstances given to define the offence should be distinctly stated, and the case should be brought within the statute by express words: 2 *Hale*, P.C. 170; *Staundf.* 132 b.; *Foster*, C.L. 423. The 9 *Geo.* 4, c. 69, s. 9, describes the offence as being, any persons to the number of three or more together by night unlawfully entering or being on any land, open or inclosed, for the purpose of taking or destroying game, any of such persons being armed; and s. 12 declares, that for the purposes of that act the night shall be considered to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise. Therefore, first, it should have been stated at what hour between sunset and sunrise the defendants were in the closes, in order to shew clearly that they were there *by night* within the meaning of the act of parliament. That was the ancient rule with respect to indictments for burglary, although it may have been somewhat deviated from in modern practice. In 2 *Hale*, 179, it is said, "Where the time of the day is material to ascertain the nature of the offence, it must be expressed in the indictment; as, in an indictment for burglary, it ought to say, 'tali die, circa horam decimam in nocte ejusdem diei, felonicé et burglariter fregit;' but, according to some opinions, 'burglariter' carries a sufficient expression that it was done in the night." And in *Waddington's case* (*a*) it was held that in an indictment for burglary, either at common law or upon 12 *Ann.* st. 1, c. 7, (repealed, but re-enacted by 7 & 8 *Geo.* 4, c. 29), it was necessary to lay the crime to have been committed in the night, and at about such and such an hour, though the evidence need not strictly correspond with the latter allegation; but that an indictment making no mention of the hour would be insufficient for burglary, though it would hold for the larceny. Secondly, there is no allegation that the defendants were unlawfully in the closes for the purpose of destroying game, it is only stated that they unlaw-

(*a*) 2 East, P. C. 513.

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fully entered the closes. The intent is not coupled with their unlawfully being there. The entry might be unlawful from the means by which it was effected, and yet the defendants, when there, might be in the pursuit of some lawful occupation. Thirdly, it is not alleged that the defendants were in the closes together to the number of three: it is merely stated that they entered the closes together to the number of three. In this the main object of the statute, namely, to prevent preconcerted resistance to apprehension, is lost sight of. Here no unity of purpose is alleged; the statement is consistent with the supposition that the defendants entered together, and separated before the intent charged was contemplated by either of them. Fourthly, there is no description of the closes; the defendants are merely charged with having entered "divers closes and inclosed lands." That is not a sufficient averment; the indictment ought in some way or other to particularise the place, because the defendant is entitled to know to what specific place the evidence is to be directed: *Ridley's case* (*a*). Lastly, the allegation, that the defendants were armed, is misplaced. The offence described in the statute is, the being in the close with intent to destroy game, being armed; the offence described in the indictment is, the being in the close, armed, with intent to destroy game: in this respect the indictment follows neither the letter nor the spirit of the statute, and is bad accordingly.

Cottingham, contrà. The fourth count is good. [Lord *Tenterden*, C. J. Can you support this count in respect of the allegation that the offence was committed by night? Does the averment that the defendants were *then and there* in the said closes, necessarily imply that they were there *by night?* Does it imply any more than that they were there *on the day and place aforesaid?* If it mean the latter only, the count is clearly bad.] The averment that the defendants were then and there in the closes, follows

(*a*) R. & R. C. C. 515.

immediately the averment that they entered the closes by night. The entry by night is the last antecedent, and to that the words "then and there" must be taken to refer, and so taken, there is, in effect, an allegation that the defendants were in the closes *by night*. The description of the offence in this count is sufficient according to the rule laid down by *De Grey*, C. J., in *Rex* v. *Horne* (*a*), and Lord *Kenyon*, C. J., in *Rex* v. *Hollond* (*b*). The former says, "The charge must contain such a description of the crime, that the defendant may know what crime it is which he is called upon to answer, that the jury may appear to be warranted in their conclusion of guilty or not guilty upon the premises delivered to them, and that the Court may see such a definite crime that they may apply the punishment which the law prescribes:" and the latter, "It is argued that three things ought to concur in every criminal proceeding; first, that the party accused may be apprised of the charge he is to defend; secondly, that the Court may know what judgment is to be pronounced according to law; and thirdly, that posterity may know what law is to be derived from the record. These are general propositions to which I assent." The count now in question should be read as one sentence, and then it clearly charges that the defendants committed an offence by entering and being by night in certain closes, armed, with intent to destroy game; and that is the offence described by the statute.

Lord TENTERDEN, C. J.—It seems to me that the objection to which I directed Mr. *Cottingham*'s attention cannot be got over. The count states that the defendants "did by night unlawfully enter divers closes, and were then and there in the said closes," &c. It does not state that they "by night did unlawfully enter, and were," &c. If it had done so—if the words "by night" had been placed at the beginning of the sentence—they might have go-

(*a*) Cowper, 682. (*b*) 5 T. R. 607.

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verned the whole sentence. Or, if they had been placed at the end of the sentence, they might have referred to the whole sentence. But here they are placed in the middle of the sentence; are applied to a particular branch of it; and cannot, therefore, be extended to that which follows. The sentence contains two distinct branches. The first states that the defendants by night entered into the closes, but does not state that they entered being armed, or for the purpose of destroying game. The second states that they were in the closes, armed, for the purpose of destroying game, but does not state that they were there by night. These two branches of the sentence being distinct, therefore, and neither of them stating all that is necessary to constitute the offence described in the statute, the count is bad. Upon this ground, without entering into the other objections that have been raised, I am of opinion that the indictment in this case cannot be supported, and that the judgment must be reversed.

The other judges concurred.

Judgment reversed.

The KING v. The Inhabitants of MARTLESHAM.

A single woman, settled in *A.*, was removed from *B.* to *C.* The order of removal was quashed on appeal, but she had been previously delivered of a bastard child in *C.*:—Held, that the child was not settled in *A.*

ON appeal against an order of justices for the removal of *Henry Athrol*, otherwise *Walford*, from the parish of Playford to the parish of Martlesham, both in the county of Suffolk, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

Sarah Athrol, single woman, being pregnant, was removed by an order of justices from Playford to Stutton. Before the sessions, she was delivered at Stutton of the pauper, a bastard. At the sessions, Stutton appealed, and the justices quashed the order. It was admitted on the present appeal, that the mother, at the time of the bastard's birth, belonged to the parish of Martlesham.

Scarlett, A. G. and *T. Clarkson*, in support of the order of sessions. Under the peculiar circumstances of this case, the pauper, though born illegitimate in the parish of Stutton, was not settled there, but in the parish of Martlesham, the place of his mother's settlement. It is a general rule, no doubt, that a bastard, being nullius filius, cannot take a settlement by parentage, and is settled where born; but the present case seems to form an exception to it. It is the very case put by *Bayley*, J. in *Rex* v. *St. Nicholas, Leicester* (*a*), where he said, "If the mother of a bastard child is laid under constraint, and removed to a place against her will, and is there delivered, the law says that the child shall not be considered as settled in that place; because the mother was not there in the character of a free agent. The legislature presumes in such a case, that if she had been left to herself she would have remained in the parish in which she was settled, and, consequently, that the burthen ought to fall in the place in which it would have fallen in the ordinary course of events but for her removal (*b*)." Here the mother was under constraint. She was settled at Martlesham, but was wrongfully removed to Stutton; therefore, she must be considered as having been resident at Martlesham at the time when the child was born. In any view of the case it is more reasonable to consider her, in construction of law, as residing in Martlesham, her own parish, than in Playford. At common law, if an illegitimate child is born while the mother is in the custody of the law, as where she is in the house of correction, *Suckley* v. *Whitborn* (*c*), or in the county gaol, *Elsing* v. *The County of Hereford* (*d*), it follows the settlement of the mother. Here, if the mother had been convicted of an offence in Playford, and committed to a gaol in Stutton, the child would have been settled in Martlesham, the place of the mother's settlement, because her residence in Stutton, being

(*a*) 4 D. & R. 462; 2 B. & C. 889.

(*b*) 4 D. & R. 467.

(*c*) 2 Bott, 2; 2 Bulstr. 358.

(*d*) 2 Bott, 4.

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constrained, would have been deemed in law a residence in Martlesham: and the mother's removal to Stutton had the same effect, for it was made by an order of magistrates over whom the parish of Playford had no control, and who sent the mother to that place in which she then appeared to them to be legally settled. The cases of *Much Waltham* v. *Peram* (*a*) and *Westbury* v. *Coston* (*b*) do not affect the present question, because they only decide that if a woman be delivered of an illegitimate child pending an order of removal which is afterwards quashed, the child is not settled in the parish in which it was born; they do not decide that the child is settled in the parish from which the mother was removed, if that parish is not the place of her settlement. In the first of those cases the mother's settlement was in Much Waltham; in the other, it does not appear from the report whether the mother's settlement was in Westbury or not.

W. E. Taunton, contrà. If the parish officers of Playford had used due diligence they might have discovered that the mother's settlement was in Martlesham, and have removed her thither before the birth of the child; instead of which they wrongfully removed her to Stutton, where she continued until the child was born and the appeal determined. The mother's residence in Stutton therefore, being the consequence of a wrongful removal, must, by construction of law, be considered as a residence in Playford, and the child must be considered as having been born in Playford, and, consequently, as settled there. At all events the removal of the pauper to Martlesham is illegal, for he is clearly not settled there, because being illegitimate he cannot derive any settlement from his mother.

Lord TENTERDEN, C. J.—It is sufficient for present purposes to say that the removal to Martlesham cannot be supported. A bastard cannot acquire a settlement by parent-

(*a*) 2 Salk. 474. (*b*) 2 Salk. 532.

age, therefore the pauper was not legally settled in Martlesham. The order of sessions must be quashed.

The other judges concurred.

Order of Sessions quashed.

MASON *v.* WALLIS.

When a cause is referred by a judge's order, empowering the arbitrator to enlarge the time as he shall appoint *and a judge shall order*, an enlargement by the arbitrator alone is irregular, and an award made after such enlargement is void.

THIS was a rule nisi for an attachment for not performing an award. It appeared that by a judge's order dated 19th June, 1822, all matters in difference in the cause were referred to an arbitrator, so as he should make his award in writing on or before the 1st day of July then next, or on or before such further or ulterior day as he should appoint in writing under his hand, to be indorsed on that order, *and the Court of King's Bench or a judge thereof should order.* All the costs were to abide the event of the award. The arbitrator, by indorsement on the order dated 29th June, 1822, enlarged the time until the 6th November then next. By a second indorsement dated 6th November, 1822, he further enlarged the time until the 23d January then next. By a third indorsement dated 23d January, 1823, he further enlarged the time until the 16th April then next. The last meeting before the arbitrator was on the 7th April, 1823. By a fourth indorsement dated 16th April, 1823, he further enlarged the time until the 1st June then next. No judge's order was obtained in respect of any of these enlargements. The arbitrator made his award on the 31st May, 1823, ordering the defendant to pay the plaintiff 11*l.* 6*s.* 7*d.* in full satisfaction of all demands. The award recited the order of reference, but did not recite any of the enlargements. The plaintiff proceeded to make the judge's order a rule of Court, and the several indorsements were made part of the rule. The plaintiff then taxed his costs, and demanded of the defendant the sum awarded, and the taxed costs; and payment being refused, he obtained this rule for an attachment.

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Barstow shewed cause. The award was not made in due time, for the enlargements of the time were not made in the mode prescribed by the order of reference. By the terms of that order the arbitrator was to make his award within a certain limited time, or such further time as he should appoint in writing, and the Court or a judge thereof should order. Two things, therefore, were necessary to the validity of any enlargement of the time, first, the arbitrator's appointment, and secondly, a judge's order; and one of these being wanting, the award is a nullity. In *Reid* v. *Fryatt* (*a*), where the terms of the order of reference were the same as here, it was held that the time was duly enlarged by the arbitrator's indorsing on the order, on the day preceding the expiration of the original time, that he required further time, although the judge's order granting further time was not obtained until a subsequent day. But there a judge's order was obtained before the award was made, and it was assumed that without such an order the award would have been bad; here no judge's order was ever obtained. *Lawrence* v. *Hodgson* (*b*) will be relied on by the other side, where it was held, that an objection that the time for making an award has not been duly enlarged, is waived by the proceeding in the reference, *with a knowledge of that fact.* But here there is nothing to shew that the defendant knew of the irregularity in making the enlargements, and besides, there was one enlargement made after all the meetings before the arbitrator had taken place. This last fact is sufficient to shew that at the time when the award was made the arbitrator had no authority: *George* v. *Lousley* (*c*), *Davis* v. *Vass* (*d*), *Wohlenberg* v. *Lageman* (*e*), *Hallden* v. *Glasscock* (*f*), and *Dickins* v. *Smith* (*g*).

(*a*) 1 M. & S. 1. And see *Good* v. *Wilks*, 2 Tidd, 881.
(*b*) 1 Y. & J. 16.
(*c*) 8 East, 13.
(*d*) 15 East, 97.
(*e*) 6 Taunt. 251.
(*f*) 8 D. & R. 151; 5 B. & C. 390.
(*g*) 8 D. & R. 285; 5 B. & C. 528.

Hutchinson, contrà. The defendant is estopped from taking this objection, because his attendance before the arbitrator after the time had been enlarged, amounted to an admission that the enlargements were duly made, and that the arbitrator had authority to act after an enlargement made by himself alone; *Lawrence* v. *Hodgson* (*a*). The rule of Court embodies all the enlargements, therefore the Court will presume that when that rule was granted proper evidence of the enlargements having been duly made was laid before them, for the defendant has not sworn that *no* judge's order was made. Against such an objection as this the Court will presume every thing, and at least will presume that the order of reference was not made a rule of Court without sufficient evidence of proper enlargement; *Dickins* v. *Smith* (*b*).

BAYLEY, J. (*c*).—I think the objection is fatal, and that the defendant is not estopped from taking it. Assuming that he waived the objection by attending before the arbitrator, still that waiver would extend only to prior enlargements, and there was one enlargement here after all the attendances were over. The arbitrator, therefore, had no authority at the time when he made the award. We cannot presume that judge's orders for enlargement were obtained merely because the order of reference was made a rule of Court. Indeed, the presumption is the other way, for if such orders had been produced, the rule would have been drawn up "on reading" those orders as well as the arbitrator's indorsements.

LITTLEDALE, J. and PARKE, J. concurred.

Rule discharged.

(*a*) 1 Y. & J. 16.
(*b*) 8 D. & R. 285; 5 B. & C. 528.
(*c*) Lord *Tenterden*, C. J. was absent from indisposition.

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PEASE and others, surviving Partners, *v.* HIRST and others.

A., gave his bankers, as a security for advances, a note, by which he and *B.* jointly and severally promised to pay on demand to the bankers or order 300*l.*, with interest. The bankers credited *A.* with the amount of the note, and debited him yearly with interest. Upon a change in the firm of the bankers the note unindorsed, was, with *A.*'s account, transferred to the new firm. At one time *A.* had a balance in the bankers' hands exceeding the amount of the note. *A.* paid interest on the note yearly to the new as well as the old firm.

Held, first, that the note, being a continuing security, might be enforced, notwithstanding the change in the banking firm.

ASSUMPSIT on a promissory note, dated 6th January, 1817, whereby defendants jointly and severally promised to pay on demand to plaintiffs and *R. Harrison, or order*, 300*l.*, with interest. Pleas, non assumpsit, and the Statute of Limitations. At the trial before *Bayley*, J., at the Yorkshire summer assizes, 1828, the case was this:—In January, 1817, the plaintiffs and *R. Harrison*, since deceased, carried on business in partnership as bankers at Hull. The defendant *Hirst* had for some years kept an account with them as his bankers, and at that time, for the purpose of obtaining credit with them, he prevailed upon the other defendants to join him in making the note in question. The note was delivered to the bankers, who thereupon credited *Hirst* for 300*l.*, and debited him yearly with interest on that amount. In November, 1820, two of the plaintiffs retired from the partnership, when a balance was struck between the old firm and the new, and *Hirst*'s account was transferred in the books from the old firm to the new. The note was at the same time delivered to the new firm, but was not indorsed to them. In December, 1821, *Harrison* died, and the account was again transferred to the new firm as before. The surviving partners continued in the business down to the time when the action was brought, but in the interval two new partners were admitted, upon whose admission *Hirst*'s account was again transferred, as on former occasions. At one period the balance of accounts was in *Hirst*'s favour to the amount of nearly 700*l.*, but that did not appear to have been a cash balance. *Hirst* was debited

Secondly, that the note not having been indorsed, the original payees (or the survivors of them) were the proper persons to sue upon it.

Thirdly, that the note was not discharged by *A.*'s having at one time in the bankers' hands a balance exceeding its amount.

Fourthly, that payment, within six years, of interest on the note by *A.* took the note out of the Statute of Limitations as to *B.*

with interest upon the note by all the different firms down to the year 1824, and he regularly allowed the same in his account. It was contended on the part of the other defendants, first, that they being merely sureties for *Hirst*, their liability had shifted with every change of the firm, and that they were now liable only to the persons constituting the last new firm, and not to the plaintiffs who constituted the original firm, which had long ceased to exist: and secondly, that as between the plaintiffs and those defendants as sureties, there was no payment of interest within six years to take the case out of the statute of limitations, such payment having within that time been made, not to the plaintiffs who were the original payees, but to the different persons constituting the firm at the time of such payment. The learned judge overruled the objections, but reserved the points, and the plaintiffs had a verdict, with liberty for the defendants to move to enter a nonsuit. A rule nisi having been afterwards obtained accordingly,

Scarlett, A. G., now shewed cause. First, the defendants are liable to the present plaintiffs. The plaintiffs are the surviving payees of the note, they have the legal interest in the note, and are the persons entitled to sue upon it. The fact that *Hirst* had at one time in the hands of the bankers a balance exceeding the amount of the note, did not operate as a discharge of the note. It did not appear that that was a cash balance; but assuming that it was, the bankers were not bound in law to apply it in discharge of the note, and in fact they never did so. Nor was it intended that they should do so; the evident intention of all parties was, that the note should remain in the hands of the bankers as a subsisting security for all advances which they should from time to time make to *Hirst*. If *Hirst* had intended that balance to have been applied in discharge of the note, he would have specifically appropriated it to that purpose; and, in the absence of any specific appropriation, the bankers were entitled to apply the balance to a different

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purpose: *Bosanquet* v. *Wray* (*a*), *Brooke* v. *Enderby* (*b*). Secondly, the payment of interest upon the note was sufficient to take the case out of the Statute of Limitations. To this objection the late case of *Burleigh* v. *Stott* (*c*) is a complete answer; for it was there held, that a payment of interest by *A.* on the joint and several note of *A.* and *B.*, is evidence of a promise by *B.*, and takes the note out of the Statute of Limitations, though *B.* was a mere surety, and the payment was made without his knowledge.

F. Pollock, contrà. The note was dated in January, 1817, and was given to the persons who then constituted the banking firm. When that firm ceased to exist, the liability of the maker to the original payees ceased also, and the note became the property of the successive firms to whom it was from time to time transferred. It was so treated both by the bankers and by *Hirst*. The property in the note, therefore, is in the persons constituting the present firm, and they are the only persons entitled to sue upon it. Three of the defendants are mere sureties, and all that they did was to agree, in January, 1817, to guarantee to certain persons then constituting the banking firm, the payment of 300*l.* advanced by that firm to *Hirst*. [*Bayley*, J. They do not appear on the face of the note to be sureties.] They were such in fact, and the form of the note cannot vary the nature of the contract. The note is payable on demand, which in a case like this is the same as if it had been payable one day after date. The sureties could not mean, by signing a note payable instanter, to take upon themselves a responsibility extending over a period of ten or twelve years; and at any rate the bankers were bound, in favour of the sureties, to apply the first available balance in their hands belonging to *Hirst* in discharge of the note: *Clayton's* case (*d*), *Bodenham* v. *Purchas* (*e*),

(*a*) 6 Taunt. 597; 2 Marsh. 319.
(*b*) 4 Moore, 501; 2 Brod. & Bingh. 70.
(*c*) *Ante*, ii. 93; 8 B. & C. 36.
(*d*) 1 Meriv. 592.
(*e*) 2 B. & A. 39.

Simson v. *Ingham* (*a*). With respect to the Statute of Limitations, the evidence furnished no answer to that plea. As against the plaintiffs the statute must be taken to run from the date of the note, it being payable instanter; and payment of interest by *Hirst* within the last six years to other persons, is no acknowledgment of a debt due to the plaintiffs from the three defendants, who are mere sureties. The payments of interest by *Hirst* were made generally on account of his fluctuating debt owing to the bankers, and were made, not to the plaintiffs, but to the persons who from time to time constituted the banking firm.

BAYLEY, J. (*b*).—I am of opinion that the verdict found for the plaintiffs is right, and ought not to be disturbed. The action is brought upon a promissory note, and the first objection is, that three of the four defendants having joined in that note as sureties, to a banking firm then consisting of the plaintiffs and one *Harrison* since deceased, their liability has ceased by the subsequent change in the firm. Assuming that those defendants are mere sureties, the question still remains whether they have restricted their liability to a limited time and to particular parties. A surety, party to a bond or note, may confine his responsibility to a particular period and particular persons; but a surety bond or note may be so framed as to comprehend an unlimited time, and future as well as present parties. In the present case no restriction either as to time or parties is apparent upon the face of the note. None of the makers have placed themselves in the place of sureties; on the contrary, the form of the note shews them all to be principals, and not to have confined their liability to the then existing firm, for the note is made payable to the plaintiffs, *or order*. This shews clearly that the note was intended by all parties to subsist from time to time as an available security to such persons as should constitute the firm, and

(*a*) 3 D. & R. 249; 2 B. & C. 65.
(*b*) Lord *Tenterden*, C. J., was absent, from indisposition.

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supplies an answer to this objection. The next objection is, that the note was discharged by a balance belonging to *Hirst*, which at one time came into the hands of the bankers, because, it is argued, the plaintiffs are bound to consider the debt owing upon the note as liquidated by that balance. Now it does not appear that that was a cash balance; but if it had been, the bankers would not have been bound to apply it in discharge of the note, because *Hirst* never specifically appropriated it to that purpose. Besides, it would have been directly contrary to the intention with which the note was given, that it should be discharged by the first money belonging to *Hirst* which came to the hands of the bankers, for the object was, that *Hirst* should from time to time have advances from the bankers, and that the bankers should hold the note as a subsisting security for those advances. If the parties who were in substance, though not in form, sureties, had called upon the bankers to apply that balance in discharge of the note, they would, perhaps, have been bound so to apply it; but no such call was ever made. A third ground of objection is, that the action is not maintainable by the present plaintiffs. It was in evidence that several changes in the firm took place, and that upon each change the note was transferred in account from the old firm to the new, and that *Hirst* from time to time paid interest to the successive firms, as upon a debt owing to the persons successively constituting the firm. It is argued that the property in the note, both in point of law and by the understanding of all parties, had passed to the last new firm, and that the persons constituting that firm were the only persons entitled to sue. It seems to me, however, that the action was properly brought in the names of the partners to whom the note was given. They were the original payees; the legal interest in the note originally vested in them; and it was never divested out of them. The note was made payable to them or order, and if they had indorsed it to the new firms, the argument on this point would have been good,

and the action must have been brought in the names of the indorsees; but not having been so indorsed, the action could only be brought in the names of the original payees, for the benefit of the parties interested. The last objection is founded upon the plea of the Statute of Limitations, in respect of which it is said, that as to the three defendants, who are mere sureties, there was no acknowledgment of the debt within six years. But it was proved that interest upon the debt had been paid within that time by one of the four persons jointly liable; and it is clear upon the authority of the case cited for the plaintiffs (*a*), and other cases, that that payment operates as an acknowledgment of the debt by all the parties, and takes the case out of the statute as to all. Upon these grounds I am of opinion that the verdict found for the plaintiffs is right, and that the rule for entering a nonsuit ought to be discharged.

LITTLEDALE, J.—I am entirely of the same opinion. It is clear that payment of interest by *Hirst*, one of the joint promissors, takes the case out of the Statute of Limitations as to all. All the defendants, therefore, are liable; and they are liable to the present plaintiffs. The firm, indeed, was changed from time to time, and the securities belonging to the old firm were transferred to the new; but still the persons entitled to the legal interest in those securities must sue upon them, and those persons, as regards the note in question, are the plaintiffs. Suppose a bond instead of a note had been given, as a security for advances, to the firm as originally composed, as well as to any persons who might afterwards be added to it; the proper persons to sue would be the surviving obligees. It is insisted that the note must be considered as discharged, by the circumstance of the bankers having at one time struck a balance which was in favour of *Hirst*. Now it was plainly not the intention of the parties to consider the note as satisfied as

(*a*) *Burleigh* v. *Stott*, *ante*, ii. 93; 8 B. & C. 86. And see the cases there cited.

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soon as there should be a balance of equal amount in the hands of the bankers; the intention was, that the note should be a continuing security for advances to be made from time to time. It is made payable on demand, and to order. There was, therefore, no legal obligation on the bankers to appropriate that balance to the discharge of the note; and there having been no appropriation by the debtor, I think the debt cannot be considered as discharged.

Rule discharged (*a*).

(*a*) *Parke*, J., having been of counsel in the cause, delivered no opinion.

The KING *v.* The Inhabitants of ST. PAUL, EXETER.

An indenture of apprenticeship to which parish officers are parties, is valid if allowed by two justices under their *hands only*, though expense be incurred, *but not clandestinely*, by the parish funds, under 56 *Geo.* 3, c. 139, ss. 1 to 10.

S. 11 of that act, which requires an allowance by two justices under their hands *and seals*, applies only to cases where expense is incurred by the parish funds, the parish officers not being parties to the indenture.

TWO justices, by their order, removed *Jane Bishop*, single woman, from the parish of St. Paul, in the city and county of Exeter, to the parish of Tedburn St. Mary, in the county of Devon; and the sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case:—

The pauper, *Jane Bishop*, was, in the year 1818, bound an apprentice *by the parish officers of Tedburn St. Mary* to one *H. Belworthy*. The indenture by which she was bound was made in pursuance of a previous order of two justices, to which reference was made by its date, and was duly executed by the said parish officers and by the master. An allowance of the same was written at the foot thereof, which was signed by two justices, *but was not under seal*. On occasion of this binding an expense of 17*s*. was incurred by the public parochial funds of the parish of St. Mary, namely, 7*s*. as the costs of preparing the indenture, and 10*s*. which were given to the master with the pauper. The pauper resided in the parish of St. Mary under this indenture for about four years.

Crowder, in support of the order of sessions. The indenture of apprenticeship in this case was one by reason of which expense was incurred by the public parochial funds, and which ought to have been approved of by two justices under their hands *and seals*, within the express words of the statute 56 *Geo.* 3, c. 139, s. 11. Its approval by two justices was not under their seals, for which defect the sessions quashed the order of removal, as they were bound to do. The section referred to recites, that the salutary provisions enacted by the 43d of *Elizabeth* were frequently evaded in the binding out of poor children, and the premium of apprenticeship, or a part thereof, was clandestinely provided by parish officers, who were thus enabled to bind out such poor children, without the sanction of justices; and enacts, "that no indenture of apprenticeship, by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual, unless approved of by two justices, under their hands and seals, according to the provisions of the said act (43 *Elizabeth*) and of this act." The words of the enactment are undoubtedly more extensive in their import than those of the recital, and they were considered to be so, and full operation was given to them, by *Bayley*, J. in *Rex* v. *Mattishall* (*a*). It is true that the first ten sections of this statute apply to parish indentures, and require *only* that the allowance of those indentures shall be *signed* by two justices. But that cannot restrain the operation of additional words in the eleventh section, and that in express terms requires that every indenture by reason of which expense is incurred by the public parochial funds, shall be allowed by two justices under their hands *and seals*. The object of the eleventh section was to place all parish bindings under the superintendence and direction of two justices. There is nothing contradictory between that and any of the preceding clauses; the one is cumulative upon, not inconsistent with the others. But independently of this, the words of the

(*a*) *Ante*, iii. 386; 8 B. & C. 735.

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eleventh section are plain, express and positive, and cannot be restricted in their fair operation, *Rex* v. *Stoke Damarel* (*a*); where it was held that an indenture, in respect of which expense was incurred by the parish, must be allowed by two justices under their hands *and seals*, though the parish officers were not parties to it: and where *Bayley*, J., speaking of this section, said, "I do not know how to get over the words of this clause of the act of parliament; they are plain and unequivocal: and I shrink from adopting a rule of construction with respect to them, which would have the effect of deciding that the legislature did not mean that which they have expressed" (*b*). [*Parke*, J. In that case the binding was one clearly within the recital of the eleventh section; *Rex* v. *Mattishall* (*c*) only shews that the enactment extends to cases ejusdem generis with those mentioned in the recital: in the latter case the parish officers did not provide part of the premium, but furnished money to purchase clothes for the apprentice.] Cases may come within the enactment which are not mentioned in the recital: the argument on the other side must be that the enactment is controlled and limited by the recital.

Coleridge, contrà. The cases which have been cited do not apply to the present, because there the parish officers were not parties to the indenture, here they are. This is a parish indenture, and the question is, whether such an indenture must be allowed under *seal* by 56 *Geo.* 3, c. 139, s. 11; a question certainly not decided in either of the cases referred to. The mischief intended to be remedied by that statute was the improper apprenticing of poor children, and the remedy suggested is the securing in all cases the control of two justices. The mischief extended to two classes of apprentices, first, parish apprentices, or children entirely and exclusively bound out by parish officers; and, secondly, apprentices *really* bound out, wholly or in part, by parish

(*a*) *Ante*, i. 458; 7 B. & C. 563.
(*b*) *Ante*, i. 466.
(*c*) *Ante*, iii. 386; 8 B. & C. 735.

officers, but *nominally* by their parents or themselves, so as to evade the provisions of the statute of *Elizabeth*. To the first of these classes the first ten sections of the present statute apply; to the second, the eleventh section. The first and second sections direct in what manner parish apprentices shall be bound, and one of the directions is that the allowance of the indenture shall be *signed* by two justices. The fifth section provides that no settlement shall be gained, unless the allowance of the indenture shall be signed as before directed. The sixth section imposes a penalty on the parish officers and the master, whenever a parish apprentice is bound without the allowance before directed. Looking at these two sections together, it is obvious that the same default is made the ground of avoiding the settlement on the one hand, and imposing the penalty on the other, namely, the binding the apprentice without an allowance *signed* by two justices. But looking at the fifth section alone the inference clearly is, that where the directions there referred to are complied with, a settlement will be gained, that is, where the allowance is signed, and signed only, by two justices. [*Bayley*, J. In this case expense has been incurred by the parish; does not that bring it within the operation of the eleventh section?] It is submitted that it does not, because this is strictly a parish binding, to which that section does not apply. In *Rex* v. *Bewburgh* (*a*), which was the case of a parish binding, and where the indenture was held to be invalid under the first and fifth sections of the statute, *Bayley*, J. is reported to have said, "I doubt whether the eleventh section applies to such a case as the present, or whether it applies only to such cases where the binding is by the parents, and not by the overseers" (*b*). Indeed that section seems to have been introduced for the very purpose of meeting those cases in which the parish officers are not the parties binding; and here they are the parties binding. [*Littledale*, J. Still there has been expense incurred by the parochial funds.] But not

(*a*) 3 D. & R. 338; 2 B. & C. 222. (*b*) 2 B. & C. 225.

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clandestinely. The recital of the eleventh section speaks of "premiums clandestinely provided by parish officers." The enactment speaks of "expense incurred by the public parochial funds." Construing both together, and at least the recital is to be considered as the key for the proper construction of the enactment, the latter must be taken to mean "expense *clandestinely* incurred." Now the sessions have not found that the money was advanced clandestinely in this case, and the Court will not presume fraud.

The case was argued at the sittings in Banc after the last term, when the Court took time for consideration. Judgment was now delivered by

BAYLEY, J., who, after recapitulating the facts of the case, proceeded to the following effect:—It was insisted that the fact of expense having been incurred by the public parochial funds brought the case within the operation of the eleventh section of the statute, the 56 *Geo.* 3, c. 139. Undoubtedly, if that section extends to cases where the binding appears, upon the face of the indenture, to be by the parish officers, the indenture now in question would be void for want of the seals of the justices. If, on the other hand, it applies only to cases where the parish officers are not parties to the indenture, but where some part of the expense attendant upon the binding is paid out of the public parochial funds, the converse would be the result. After a careful consideration of the statute, and conferring with my Lord *Tenterden*, who concurs in the judgment I am about to pronounce, we are of opinion that the first ten sections are confined to cases where the parish officers are parties to the indenture of apprenticeship, and that the eleventh section is confined to cases where the parish officers are not parties to the indenture, but where expense is incurred by the public parochial funds. That this is the true meaning of the eleventh section appears to us to be evident from the use of the word "clandestinely" in the preamble of that section. The mischief recited in that

preamble is, that the premium of apprenticeship, or a part thereof, was *clandestinely* provided by parish officers, who were thus enabled to bind out poor children without the sanction of justices; and, for remedying that mischief, the enacting part of the clause provides, that no indenture, by reason of which any expense shall be incurred by the public parochial funds, shall be valid, unless approved of by two justices under their *hands and seals*. The first ten sections, which evidently apply only to bindings by parish officers, require that the indenture shall be approved of by two justices, under their *hands only*. Parish officers cannot be said to provide the premium clandestinely where they are parties to the indenture; therefore, the eleventh section can apply only to cases where they are not parties to the indenture, but where they do provide the premium, or some portion of it. In this case the parish officers were parties to the indenture, which, therefore, is one regulated by the first ten sections of the statute; and the allowance of it being signed, though not sealed, by two justices, it is a valid indenture, and the pauper gained a settlement by service under it in the parish of Saint Mary. The order of sessions must consequently be quashed.

Order of Sessions quashed.

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By the Oxford Canal act the proprietors were authorised to take a mileage tonnage for coals and other goods, excepting coals for two miles, in respect of which the proprietors of the Coventry Canal were authorised to take all dues payable under that act for all coals carried from the Oxford Canal within those two miles. By the same act the proprietors of the Oxford Canal were authorised to take all dues payable under the Coventry Canal act, for all goods, except coals, carried upon the Oxford Canal, and afterwards upon the Coventry Canal, within three miles and a half of the point of junction of the two canals. That point of junction was in parish F., which contained one mile nine hundred and sixty-three yards of the Oxford Canal, part of the two miles before mentioned, and two miles and a quarter of the Coventry Canal, part of the three miles and a half before mentioned.

By the Grand Junction Canal act, reciting that that canal might be injurious to the proprietors of the Oxford Canal, and that compensation should be made to them for such injury, they were authorised to take 2*s.* 9*d.* per ton for all coals passing from the Oxford Canal into the Grand Junction Canal, without regard to the distance they might pass on the Oxford Canal; and 4*s.* 4*d.* per ton for all other goods passing from any canal into the Oxford Canal, and from thence into the Grand Junction Canal, or vice versâ, without regard to the distance they might pass on the Oxford Canal:—

Held, that the proprietors of the Oxford Canal were ratable in parish F. for *all* the dues received by them, in the proportion in which they were severally earned in that parish, but that, in fixing the rate, *all* the expenses incurred in maintaining the part of the canal situate in that parish must be first deducted from the total amount of dues received.

BY a rate made for the relief of the poor of the parish of Foleshill, in the county of the city of Coventry, the Oxford Canal Company were rated for their messuages, buildings, stop-land, towing-path, and that part of the canal lying within the said parish, and for the tolls, duties, and tonnages arising therefrom, estimated as of the annual value of 2000*l.*, at 100*l.* On appeal, the sessions confirmed the rate, subject to the opinion of this Court upon the following case:—

By 9 *Geo.* 3, c. 70, the appellants were empowered to make and maintain a navigable canal from the Coventry Canal Navigation to the city of Oxford. The appellants are the owners and occupiers of the canal which has been made by virtue of this act. The length of the canal is as follows:—

From the northern extremity at Longford, where it joins the Coventry Canal, to Braunston, the point of union with the Grand Junction Canal, is thirty-four miles seven eighths.

From Braunston to Napton, the point of union with the Warwick and Napton Canal, is seven miles.

From Napton to Oxford, the southern extremity, is forty-nine miles one eighth; and the total length of the Oxford Canal is ninety-one miles.

By the said Oxford Canal act the company are empowered to levy a mile tonnage for coals and other merchandises carried upon this canal, which they levy accordingly, *excepting only that they are not to take a tonnage upon coals for a distance of two miles, measured from Longford towards Braunston*, respecting which it is enacted as follows:— "Provided nevertheless, and be it further enacted, that it shall be lawful for the company of proprietors of the Coventry Canal Navigation, their successors and assigns, from time to time and at all times hereafter, to take and receive all the rates and duties payable by virtue of this act for all coals that shall be carried or conveyed from any part or parts of the said intended cut or canal, within two miles from the junction thereof with the Coventry Canal at Longford aforesaid; which said rates and duties so to be collected and received, shall be and are hereby vested in the said company of proprietors, their successors and assigns, and shall and may be collected and levied by them in such manner, and with such and the like remedies and powers for collecting and levying thereof, as any rates or duties granted by this act can or may be collected or levied, and the same, when received, shall be applied and disposed of to and for the same uses, intents and purposes, as the several rates and duties granted by an act of 8 *Geo.* 3, entitled, 'An Act for making and maintaining a Navigable Canal from the City of Coventry, to communicate upon Tradley Heath, in the County of Stafford, with a Canal now making between the Rivers Trent and Mersey,' are thereby directed to be applied and disposed of, and to no other use or purpose whatsoever; and that it shall be lawful for the said company of proprietors of the navigation intended to be made by virtue of this act, to take all the rates and duties payable by the said recited act, for all goods, wares and merchandises, except coals, which shall be navigated, carried or conveyed upon any part or parts of the said canal intended to be made by virtue of this act, and afterwards upon the said Coventry Canal, within three

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miles and a half of the junction of the two canals at Long ford, towards Coventry; which said last-mentioned rates and duties so to be collected and received, shall be and are hereby vested in the said company of proprietors of the Oxford Canal Navigation, their successors and assigns, and shall and may be collected and levied by them in such manner, and with the like remedies and powers for collecting and levying thereof, as any of the rates and duties directed to be paid by the said recited act can or may be collected and levied, and the same, when received, shall be applied and disposed of to and for the several uses, intents and purposes, as the several duties granted by this act are directed to be applied and disposed of, and to and for no other use or purpose whatsoever; any thing contained in the said recited act or this act to the contrary notwithstanding."

The said recited act of 8 *Geo.* 3, imposes a mile tonnage on coals and all other merchandises passing along the Coventry Canal.

The point of junction of the Oxford and Coventry Canals is in the respondent parish, which parish contains one mile nine hundred and sixty-three yards of the Oxford Canal, being part of the two miles above mentioned, and also two miles and a quarter of the Coventry Canal, being part of the three miles and a half above mentioned. The company of proprietors of the Oxford Canal are neither owners nor occupiers of any part of the Coventry Canal.

The Oxford Canal Company are further entitled to certain compensation tonnages, by virtue of the Grand Junction Canal act, 33 *Geo.* 3, c. 80, which enacts as follows:— "And whereas it being apprehended that the making of the said intended canal *will be injurious to the company of proprietors of the Oxford Canal Navigation;* it is agreed that the compensation hereinafter mentioned shall be made to them *as an indemnification against such injury:* Be it therefore enacted, that instead of the tolls, rates and duties which would have been payable to the company of proprie-

tors of the said Oxford Canal Navigation, by virtue of certain acts of 9, 15, and 26 *Geo.* 3, for making and maintaining the said Oxford Canal Navigation, or any of them, for or in respect of the coals, goods, and other things hereinafter mentioned and made chargeable with certain rates to the company of proprietors of the said Oxford Canal Navigation, in case no alteration had by this act been made in the tolls, rates and duties payable to them, it shall be lawful for the company of proprietors of the said Oxford Canal Navigation to take for their own proper use and behoof the respective rates hereinafter mentioned; that is to say, for all *coals* that shall pass from the said Oxford Canal into or upon the said intended canal, the sum of 2*s.* 9*d.* a ton, and so in proportion for a less quantity than a ton, without any regard to the distance the same shall pass on the said Oxford Canal; and for all other goods, wares, merchandises and things which shall pass from any navigable canal into or upon the said Oxford Canal, and from thence into or upon the said intended canal, or from the said intended canal into or upon the said Oxford Canal, and from thence into or upon any other navigable canal, except lime and limestone, and also except all such articles and things as are at present exempt from the payment of any tolls, rates or duties to the company of proprietors of the said Oxford Canal Navigation, the sum of 4*s.* 4*d.* a ton, and so in proportion for a less quantity than a ton, without any regard to the distance the same shall pass upon the said Oxford Canal."

The Oxford Canal Company are further entitled to tolls, by the following clauses of the Warwick and Napton Canal act, 34 *Geo.* 3, c. 38:—"And whereas the making the said intended canal may be injurious to the company of proprietors of the Oxford Canal Navigation, unless provision be made for preventing any such injury: Be it therefore enacted, that it shall be lawful for the company of proprietors of the said Oxford Canal Navigation to ask, demand, take and receive, to and for their own proper use, over and

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above all the rates of tonnage or duties which they are or shall be entitled to for or in respect of any coals, goods and merchandises, or other things navigated or passing in or upon any part of the said Oxford Canal, by virtue of any acts of parliament now in force, except as hereinafter is excepted, the rates or duties hereinafter mentioned; that is to say, for all coals which shall be navigated out of the said intended canal into the said Oxford Canal, the sum of 2*s.* 9*d.* a ton, and so in proportion for a less quantity than a ton; for all goods, wares, merchandises and things (except lime and limestone and manure) which shall be navigated out of the said intended canal into the said Oxford Canal, or out of the said Oxford Canal into the said intended canal, (except such as shall be bonâ fide navigated from the Coventry Canal,) or from any intermediate place between the said Coventry Canal and the said intended canal, into the said intended canal, the sum of 4*s.* 4*d.* a ton, and so in proportion for a less quantity than a ton."

The Oxford Canal Company are rated in the parish of Foleshill in the aforesaid sum of 2000*l.*, in manner following:—

	£.	s.	d.
1. For the mile tonnage payable to the Oxford Canal Company for merchandises (not being coals) passing along the Oxford Canal, in the parish of Foleshill, for as far as such merchandises pass in that parish	450	0	0
2. For the mile tonnage payable to the Oxford Canal Company in respect of tolls collected on the Coventry Canal, in the proportion of one mile nine hundred and sixty-three yards to two miles	60	0	0
3. For such a proportion of the compensation tonnage payable to the Oxford Canal Company under the Grand Junction Canal act, for merchandises (not being coals) passing from the Coventry Canal along the Oxford Canal into the Grand Junction Canal, and vice versâ, and consequently through the parish of Foleshill, as one mile nine hundred and sixty-three yards bears to thirty-four miles and seven eighths	900	0	0
Carried forward	1410	0	0

Brought forward . . .	£1410 0 0	
4. For the same proportion of the compensation tonnage for coals passing along the same portion of the Oxford Canal from the Coventry Canal into the Grand Junction Canal,	1090 0 0	
	2500 0 0	
From this sum of 2500*l.* a deduction of 20*l.* per cent. has been made, as the reasonable profit of a supposed lessee,	500 0 0	
	£2000 0 0	

Which leaves the sum of 2000*l.* as the supposed rental of the above-mentioned tolls, and upon which the rate has been made. The mile tonnage payable to the Coventry Canal Company, for coals passing along the Oxford Canal, in the parish of Foleshill, is 350*l.* The parochial rates on landed property in Foleshill, payable by the occupiers, are six shillings in the pound on the amount of their actual rents. The sum which the Oxford Canal Company receive upon all their compensation tonnages, taken in the proportion of one mile nine hundred and sixty-three yards to ninety-one miles, is 1000*l.*; the expense of collecting the tolls for which the company are assessed is 5*l.* per cent. The annual repairs of the canal in the parish of Foleshill amount to 20*l.* The annual repairs of the *whole* canal amount to 4000*l.* The expense of works, (such works not being situated at Foleshill,) by which that part of the canal which lies in the parish of Foleshill is supplied with water, amounts to 100*l.* The works by which that part of the canal which lies in the parish of Foleshill is supplied with water, supply the canal for a distance of forty miles. The total amount of the tolls collected on the canal is 50,000*l.* The tolls payable throughout the said distance of forty miles, estimated on the principle of the assessment in the parish of Foleshill, amount to 25,000*l.* The questions for the consideration of this Court are,

First, For what tolls, and for what proportions of such tolls, are the Oxford Canal Company ratable in the respondent parish?

Secondly, To what deduction are the Company entitled,

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to place them on an equal footing with the other occupiers of land in the same parish?

The rate is to be amended accordingly.

Amos, in support of the rate, and of the order of sessions. First, the Oxford Canal Company are ratable "for the mile tonnage payable to them for merchandises (not being coals) passing along the Oxford Canal, in the parish of Foleshill, for as far as such merchandises pass in that parish." This is clear upon the principle laid down in *Rex* v. *Milton* (*a*), and recognised in subsequent cases (*b*), namely, that every parish through which a canal passes is entitled to receive from the canal company, out of the general fund arising from the tolls, a sum proportionate to that which the land used by the company in that parish produces. Secondly, the Oxford Canal Company are ratable "for the mile tonnage payable to them in respect of tolls collected on the Coventry Canal, in the proportion of one mile nine hundred and sixty-three yards to two miles." The Oxford Canal Act vests in the Oxford Canal Company certain tolls earned on the Coventry Canal in respect of all merchandises (except coals) for the distance of three miles and a half on the Coventry Canal. The same act vests in the Coventry Canal Company the tolls for coals passing on the Oxford Canal for a distance of two miles measured from Longford, the point of junction, towards Braunston. In effect, the Oxford Canal Company give to the Coventry Canal Company two miles of their canal, part of which is in the parish of Foleshill, and receive from them the tolls earned on three miles and a half of the Coventry Canal. But the profit is produced by the two miles of the Oxford Canal, part of which is in the parish of Foleshill, and is, consequently, ratable in that parish. Thirdly, the Oxford Canal Company are ratable "for such a proportion of the

(*a*) 3 B. & A. 112.

(*b*) See *Rex* v. *Kingswinford*, *ante*, i. 20; 7 B. & C. 236; *Rex* v. *Lower Mitton*, *ante*, iv. 711; 9 B. & C. 810; and the various authorities therein referred to.

compensation tonnage payable to them under the Grand Junction Canal Act, for merchandises (not being coals) passing from the Coventry Canal along the Oxford Canal into the Grand Junction Canal, and vice versâ, and consequently through the parish of Foleshill, as one mile nine hundred and sixty-three yards bears to thirty-four miles and seven-eighths." It is presumed that this proposition will not be disputed, for it is founded upon the decision of this Court in *Rex* v. *The Oxford Canal Company* (*a*), which is expressly in point. Upon the same principle it will follow that, fourthly, the Oxford Canal Company are ratable "for the same proportion of the compensation tonnage for coals passing along the same portion of the Oxford Canal from the Coventry Canal into the Grand Junction Canal." There can be no distinction between the compensation tonnage for coals and that given for other merchandises; or, if there is, it lies upon the other side to shew it: because, according to the decision in *Rex* v. *The Oxford Canal Company*, the compensation tonnage in this case is divisible among the parishes used by the Grand Junction Canal Company in earning that tonnage. The Grand Junction Canal Company, upon the supposition that they might have occasion to use the Oxford Canal, gave the Oxford Canal Company a compensation for that use in the shape of a toll of 2*s*. 9*d*. on coals, and 4*s*. 4*d*. on other merchandises. That supposition has been realized, the Grand Junction Canal Company have used that part of the Oxford Canal which lies in the parish of Foleshill, for the passage of coals out of the Coventry Canal from Longford to Braunston. It follows that the Oxford Canal Company are ratable for such proportion as their land lying in the parish of Foleshill bears to the entire distance. The question of ratability being thus disposed of, the only remaining question is, what deductions from the gross amount of the tolls are to be made in favour of the Oxford Canal Company. The principle upon which that question must be

(*a*) 6 D. & R. 86; 4 B. & C. 74.

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decided, is this, that the rent is the criterion of the value of the occupation of the land; *Rex* v. *The Trustees of the Duke of Bridgewater* (*a*). It was there decided, that the proprietors of a canal were ratable in respect of their occupation of land, upon the sum for which the land would let, and not upon the net produce of the land. Here, in fixing the rate, a deduction of 20*l.* per cent. has been made, "as the reasonable profit of a supposed lessee," and the residue of the tolls has been rated as the amount of annual rent which a tenant would pay. [*Parke*, J. The poor rate certainly ought to be deducted, for if a tenant pays the poor rate he will pay so much less rent to his landlord.] Upon that principle, undoubtedly, it does seem just that the poor rate should be deducted.

Hill, contrà. It is not intended to dispute the ratability of the Oxford Canal Company, so far as respects the first three items mentioned in the rate; but it is confidently submitted that they are not ratable in respect of the compensation tonnage for coals mentioned in the fourth item. The term "compensation tonnage" implies that such tonnage was given in lieu of something given up. But the Oxford Canal Company gave up nothing for which they were ratable; therefore, they are not ratable for the compensation. The Coventry Canal was in work before the Oxford Canal was made. The Oxford Canal Company take the tonnage mentioned in the third item of the rate. The Coventry Canal Company take a tonnage for coals on a certain part of the Oxford Canal, covering the whole of the parish of Foleshill. Therefore, when the Grand Junction Canal Act was passed, the Oxford Canal Company had no tonnage for coals passing through the parish of Foleshill. [*Parke*, J. Surely under the act of 33 *Geo.* 3, the canal in Foleshill may be used for the purpose of carrying coals.] Not so as to afford a profit to the Oxford

(*a*) *Ante*, iv. 143; 9 B. & C. 68.

Canal Company, and, therefore, not so as to render them ratable. [*Parke*, J. They received the compensation tonnage as an indemnification against the injury they were supposed likely to sustain by means of the formation of the Grand Junction Canal.] The Coventry Canal Company have still what they originally had, the mileage tonnage upon coals passing through the parish of Foleshill. If that which has been called compensation tonnage is to be considered as an indemnification against the general injury to the Oxford Canal, it ought to have been given in the proportion which the length of that part of the canal that is in the parish of Foleshill bears, not to the length of that portion of the canal which lies between the parish where it joins the Coventry Canal and Braunston, but to the whole line of the canal. When the Grand Junction Canal Act passed, the mileage was 1*d.* per ton for coals, and 1½*d.* for other goods. The compensation tonnage of 2*s.* 9*d.* and 4*s.* 4*d.* was evidently computed with reference to the 1*d.* and 1½*d.* per mile. The mileage for coals at 1*d.* for 34⅞ miles would be 2*s.* 10⅞*d.* But the Coventry Canal Company was then entitled to the mileage over 2 miles. Deducting then 2*d.* from the 2*s.* 10⅞*d.*, and giving the party to be indemnified the benefit of the fraction of the compensation tonnage for coals would be reasonably fixed at 2*s.* 9*d.* The compensation tonnage therefore proceeds upon the principle that the Oxford Canal Company had no tonnage over these two miles; and the legislature has not made the public pay double tonnage in the parish of Foleshill, which it would have done if the portion of the canal which is in that parish had been considered the meritorious cause of earning a portion of the compensation tonnage. Coals now pay and always did pay to the Coventry Canal Company mileage for that part of the canal which is in Foleshill, and if the 2*s.* 9*d.* a ton relates to that portion of the canal, coals would in Foleshill pay double tonnage In order to make a canal ratable, there must be not only a user of it in the parish, but a profitable user. Here, there was no pro-

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fitable user of the canal by the Oxford Canal Company in respect of the carriage of coals in the parish of Foleshill. The only remaining question is, what deductions ought to be made; in other words, what proportion of the total amount of tolls received ought to be considered as constituting the sum for which that part of the canal which lies within the parish of Foleshill would let to a tenant. As there has never in fact been any tenant, but the canal has remained in the hands of the proprietors, who have collected the tolls themselves, it 'is not very easy to ascertain that amount with precision. It is, however, admitted, supposing the canal to be let, that the tenant ought to have a profit of 20*l.* per cent. That must be taken to mean a net profit; a profit resulting after deducting all payments made in respect of the canal: therefore, the poor rate, the expense of collecting the tolls, and the expense of annual repairs, ought to be deducted from the total amount of tolls received. Now the annual repairs of that part of the canal which lies in the parish of Foleshill amount to 20*l.*; and the annual repairs of the whole line of the canal amount to 4000*l.*: there may be a question, therefore, whether the sum to be deducted should be such a proportion of the total amount of repairs as the length of canal in the parish of Foleshill bears to the whole line of the canal, or only the amount of repairs incurred in that part of the canal which lies in the parish of Foleshill. [*Bayley*, J. I feel no doubt upon that question. The rate must be in proportion to the value of the land in the parish where the rate is made; therefore all expenses incurred in repairing that part of the canal in that parish must be deducted.] The expense of supplying water for the canal must also be deducted. It is analogous to the expense of supplying manure for the cultivation of land. The real value of land is its value after deducting the expenses of cultivation. Without a supply of water the canal could never produce any profit at all. [*Bayley*, J. No doubt there must be a deduction in that respect. The sessions must compute the

quantum. We can only lay down the principle. We never compute the quantum, except where the sessions tells us the principle upon which they have calculated the quantum, and their calculation is evidently erroneous.] The case finds that the works by which that part of the canal which lies in the parish of Foleshill is supplied with water, supply the canal for forty miles. The true principle, therefore, will be to fix the quantum in the proportion which the part of the canal situate in the parish of Foleshill bears to forty miles.

BAYLEY, J., after conferring with the other judges.—The principle which we lay down is this:—The sessions must make an allowance for the proper proportion of the expense of supplying water; and they must make allowance for the poor rate, the expense of annual repairs, and the expense of collecting the tolls. The only question for our consideration is, whether any part of the compensation tonnage can be regarded as having been earned in the parish of Foleshill. With reference to that question we shall take time to consider of our judgment.

Cur. adv. vult.

BAYLEY, J.—The several questions which were argued on both sides, in this case, were disposed of in the course of the argument, except that arising upon the fourth item of charge on the company mentioned in the special case. It was contended that the company were not ratable in respect of a proportion of the compensation tonnage for coals passing along the portion of the Oxford Canal lying in the parish of Foleshill, from the Coventry Canal into the Grand Junction Canal, because it was said that the tonnage on coals was a compensation to the company for the injury done by the construction of the Grand Junction Canal, pursuant to the 33 *Geo.* 3, c. 80, to their former coal tonnage; and that as the company had, before the passing

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of that act, no coal tonnage in the parish of Foleshill, no part of the compensation tonnage could be considered as earned in that parish. It was further urged that the new tonnage dues were given by that act *instead* of the old dues, and must be considered as standing, with respect to their ratability, in the same situation. Upon reference, however, to the Grand Junction Canal Act, it would seem that the new coal tonnage is not given as a compensation for the injury done to the company, in respect of the old coal tonnage, *specifically*. The recital shews that it was given because it was apprehended that the intended canal would be injurious to the Oxford Canal *generally*, and that certain compensations ought to be made for that *general* injury; and the legislature thought that an indemnification would be given by certain new dues upon coals and other goods carried to or from the intended canal by means of the Oxford Canal, without regard to the distance they might be carried on the latter. And these new dues do not appear to be *in addition* to the old dues, but the public are to pay one class of dues only; and this seems to be the meaning of the introductory words of the clause, making them payable *instead* of the former tolls. The Grand Junction Canal would probably benefit the Oxford Canal in that part of it which formed the line of communication between that and the Coventry Canal, namely, from Longford to Braunston, and it would probably be in other parts where they to a certain degree were parallel, namely, from Napton to Oxford, that the injury would occur: and the intention probably was to recompence the injury in one part by compensation in another.

The question, however, is, not for what injury the right to receive the new tonnage dues is given as a compensation; or, in other words, for what reason the legislature have given that right to the Oxford Canal Company; but, what is the legal liability of the company in respect of these dues, when received by them, to contribute to the poor rate. The Company are ratable in each parish for the net

annual profit of the portion of the canal lying in that parish; in other words, for what the canal earns in each parish; and the tonnage dues are paid by the owners of goods *for passing along the canal*, and are received by the company *for the use of the canal*, though the reason of their being enabled by the legislature to receive them was, that their canal was likely to be injured by the new navigation. It was upon this ground that these dues were received for the use of the canal, and were earned by the canal, that the company were held ratable in respect of them in *Rex* v. *The Oxford Canal Company* (*a*). For the passage of coals, therefore, along the part of the canal lying in the parish of Foleshill, some portion of the new dues is received by the company, and in respect of that portion the rate is proper.

It is true that the consequence of this will be, that for coals passing along that part of the canal lying within two miles from the junction with the Coventry Canal, the company will receive more dues, and therefore be ratable for more, than for those passing along other parts of the canal; because they will receive for such coals the proportion of compensation dues above mentioned *directly*, and *indirectly* a part of the tonnage dues on other goods on the first three miles and a quarter of the Coventry Canal, for which it is admitted by their counsel that they were properly rated in the rate in question. But this consequence can make no difference in the construction of the act of parliament, which makes the dues payable by the public to the company *for passing along their canal*, so that those dues constitute a part of the profits of that portion of the canal along which they pass.

The canal earns no part of the *original* tonnage upon coals carried along the two miles in the parish of Foleshill into the Coventry Canal, because it receives its *equivalent* by means of the tonnage upon other goods for the first three miles and a half upon the Coventry Canal; but those

(*a*) 6 D. & R. 86; 4 B. & C. 74.

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two miles contribute to earn the *compensation* tonnage, and for that there is no equivalent.

The rate is therefore to be confirmed in this respect; but the case must be referred back to the sessions to make the several deductions to which the company were held, upon the argument, to be entitled.

Rule accordingly.

BROWN and others *v.* C. DUNCAN.

The breach of mere revenue regulations, which tend to insure the due payment of duties imposed upon the manufacture of an exciseable article, does not render the trade itself illegal, so as to incapacitate the manufacturer from recovering the price of such article, or from suing upon a guarantee given for the due payment thereof.

ASSUMPSIT on the following guarantee given by the defendant to the plaintiffs, Messrs *Brown* & Co.:—

"7 January, 1826. Messrs. *Brown* & Co. I hereby undertake to guarantee the due payment of all sums of money which Mr. *Alexander Glennie* may become indebted to you as your agent in the sale of malt whiskey, and for which Mr. *Glennie* shall not duly account for or pay and discharge. *Peter Duncan.*"

At the trial before Lord *Tenterden*, C. J. at the sittings at Guildhall after last Trinity term, it was proved, that after the guarantee *Glennie* became indebted to the plaintiffs within the terms of the guarantee in 2300*l.* On the part of the defendant it was shewn, that *Clerk*, one of the plaintiffs, carried on business at Aberdeen as a retailer of spirits, within two miles of the plaintiffs' distillery, and that his name was not inserted in the licences taken out for the distillery under 6 *Geo.* 4, c. 81, sect. 7 (*a*). It was contended, that these circumstances rendered the joint trading of the five plaintiffs illegal under that statute and

(*a*) "That in every licence to be taken out, under or by authority of this act, shall be contained and set forth the purpose, trade, or business, for which such licence is granted, and the true name and place of abode of the person or persons taking out the same, and the true date or time of granting such licence, and (except in the case of auctioneers) the place at which the trade or business for which such licence is granted shall be carried on."

under 4 *Geo.* 4, c. 94, sect. 131 (*a*), and sect. 132 (*b*), and that the plaintiffs were thereby disqualified from suing for the price of spirits distilled by them, and from enforcing a guarantee given in respect of sales of such spirits. The learned judge directed a verdict for the plaintiffs, giving leave for the defendant to move to enter a nonsuit.

F. Pollock now moved accordingly. *Clerk* could not be entitled to sue, even if the omission of his name in the licences had arisen merely from negligence; but here the omission of *Clerk*'s name in the licence was for a fraudulent purpose; and the Court will not extend the same indulgence to fraud as to errors. If *Clerk* had been let in as a partner without the knowledge of the defendant, the defendant would have contracted no liability to him. He would have a right to say, I was dealing with *Brown* & Co., not as they chuse to arrange amongst themselves, but as they give out to the world. [Lord *Tenterden*, C. J. In *Johnson* v. *Hudson* (*c*), it was held that the mere breach of a revenue regulation, protected by a penalty, was no answer to an action.] In *Cannan* v. *Bryce* (*d*), the distinction between malum prohibitum and malum in se was expressly overruled. In *Bensley* v. *Bignold* (*e*), a printer, who had

(*a*) "That if any distiller licensed under this act shall at any time, during the continuance of such licence, be directly or indirectly concerned or interested in the sale of any spirituous liquors whatever by retail, or in carrying on the business or trade of a retailer of any spirituous liquors whatever, such distiller, in each and every such case, shall forfeit the sum of 200*l.*"

(*b*) "That no distiller licensed under this act shall be directly or indirectly concerned or interested in carrying on the trade of a wholesale dealer in spirits, or be concerned in trade with any wholesale dealer in spirits at any place within the distance of two miles from the distillery of such distiller; and if any such distiller shall be directly or indirectly concerned or interested in the trade or business of a dealer in spirits at any place within such distance of such distillery, then, and in every such case, such distiller shall forfeit the sum of 200*l.*"

(*c*) 11 East, 180.

(*d*) 3 B. & A. 179.

(*e*) 5 B. & A. 335.

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not affixed his name, was not permitted to recover for his labour and materials. [*Parke*, J. Your argument goes to shew that the plaintiffs cannot sue for any purpose.] It was so held in *Bensley* v. *Bignold*. [Lord *Tenterden*, C. J. There the act of printing was illegal. Here the distilling was illegal, but not the sale.] The goods might have been seized in transitu if it had been known that five persons were interested in the distillery. If *Cannan* v. *Bryce* and *Bensley* v. *Bignold* are law, this action cannot be supported. In *Cannan* v. *Bryce* it was held that the plaintiff could not recover, because he knew that the money which he lent was intended to be applied in paying stock-jobbing differences, which the law had said should not be paid. In that case, it was said by one of the judges, that the only way to make parties obey the law is to make it their interest not to violate it. In *Law* v. *Hodson* (*a*), a brick-maker was not allowed to recover the price of bricks sold, because they were not of the statutable size. [*Parke*, J. Here the provision is not for the protection of purchasers, as in the case of brick-making.] The 4 *Geo.* 4, c. 94, s. 131, imposes a penalty on a licensed distiller carrying on the trade of a retailer. A party is not at liberty to pay the penalty and do the act. The 132d sect. is however clear of any difficulty, that section expressly prohibiting distillers from being concerned or interested in the trade of a wholesale dealer in spirits within two miles distance from the distillery. The 6 *Geo.* 4, c. 81, s. 7, requires the time, name and place of abode of the distiller to be mentioned in the licence, the name having been required by the previous statute 4 *Geo.* 4, c. 94, s. 7. After an experience of two years, the legislature found that requiring the name only was not sufficient. These spirits were seizable any where. They might have been followed to the Port of London. [Lord *Tenterden*, C. J. Is there any clause to that effect, or is that merely your own inference?] It is understood that they are clearly seizable. [Lord *Tenter-*

(*a*) 11 East, 300. And see *Wilkinson* v. *Loudonsack*, 3 M. & S. 117.

den, C. J. You object that the dormant partner could not sue.] That might be contended, but it is unnecessary to go so far. A dormant partner need not be joined as a co-plaintiff, *Lloyd* v. *Archbowle* (*a*). *Clerk* had no property in these goods. By reason of the illegality of the transaction, he could not have filed a bill against his partners to account for the profits of the trade.

Cur. adv. vult.

Lord TENTERDEN, C. J. now delivered the judgment of the Court, after stating the facts of the case and referring to the statutes. It was contended at the trial, that *Clerk* having acted in violation of these statutes, it was incompetent to him to sue for the price of the spirits illegally distilled, and that, therefore, the present defendant, who has guaranteed the price, could not be sued. But we think that this objection cannot be supported. The acts in question contain no clause preventing the carrying on of the trade of a distiller by persons who have not complied with the regulations prescribed for the security of the revenue. *Hodgson* v. *Temple* (*b*) was a very strong case. The goods were sold with a knowledge on the part of the vendor that the vendee filled the incompatible characters of rectifier and retailer, and they were delivered at a place where the vendee carried on business, not in his own name, but in the name of another person, which was contended to be a clear violation of the law. In *Johnson* v. *Hudson* (*c*), the vendors recovered the price of tobacco which they had sold without being licensed, on the ground that this was not a fraud upon the revenue, but merely the breach of a fiscal regulation, protected by a specific penalty. The present

(*a*) 2 Taunt. 324. And see *Mauman* v. *Gillett*, ib. 325, n.; *Lucas* v. *Delacour*, 1 M. & S. 249; *Matthews, ex parte*, 3 Ves. & B. 125; *Gardiner* v. *Davis*, 2 C. & P. 49. It appears to be in the option of the plaintiffs to sue with or without joining the dormant partner. *Skinner* and others v. *Stocks*, 4 B. & A. 437.

(*b*) 5 Taunt. 181.

(*c*) 11 East, 180.

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case is very different from those which turn upon acts of parliament having for their object the protection of the public, as the acts against stock-jobbing, and those against usury, or against the fraudulent making of bricks below a certain size; we are, therefore, of opinion, that the plaintiffs are entitled to recover, and the defendant will take no rule.

Rule refused (*a*).

(*a*) And see *Little* v. *Poole*, 9 B. & C. 192.

BROWNE *v.* CUMMING and others.

Where a party suing for a malicious prosecution, had obtained a copy of the indictment by virtue of the attorney-general's fiat, granted under a mis-statement as to the view entertained by the judge before whom the indictment was tried, the Court refused to stay the proceedings or to prevent the plaintiff from using on the trial the copy so obtained.

Semble, that the indictee is entitled, as of right, to a copy of the record of the acquittal (*b*).

THE plaintiff, a bankrupt, was indicted for concealing the sum of 24*l.* 15*s.* At the trial before *Burrough*, J., at the Bridgewater assizes, 1827, the plaintiff was acquitted; upon which his counsel, *Bompas*, Serjt., applied to the learned judge for a copy of the indictment. This his lordship refused to grant. Upon a representation made to the attorney-general that the learned judge had changed his mind, and would now grant the application if he had power to do so, the attorney-general (*c*) gave his fiat for the granting of a copy; but upon the learned judge's stating that his views had been misrepresented, a rule was obtained, calling upon the plaintiff to shew cause why he should not be restrained from using such copy of the indictment.

C. F. Williams and *Bompas*, Serjt., now shewed cause. The learned judge had no power to withold from the plaintiff a copy of the indictment. Præf. 3d Coke Rep. 2. 1 Mann. & Ryl. 279, n. (*a*). By the Parliament Roll there vouched, the right of all persons to free access to records in which they are interested is fully recognized. The first restriction upon this right was made by an order of some of the judges at the Old Bailey, immediately after the

(*b*) *Et vide ante*, i. 279, (*a*). (*c*) Sir *Charles Wetherell*.

Restoration. Here the learned judge thought, that under the seventh resolution he had no power to make an order for a copy of the indictment. In *Jordan* v. *Lewis* (*a*), the plaintiff offered in evidence the copy of an indictment which had been granted to his co-indictee only; and upon its being objected, under the Old Bailey order, that a copy could not be read, *Lee*, C. J. said, that he could not refuse to let the plaintiff read it, and the Court refused to set aside the verdict obtained by the plaintiff on this evidence. The same point was decided in the late case of *Caddy* v. *Barlow* (*b*), where the Court refused to entertain the question, as to the alleged fraudulent manner in which the copy had been obtained. It is true that *Foster*, J. says, that the statute 46 *Edw.* 3 relates to those records in which the subject may be interested, as matters of evidence upon questions of private right; and he cites what passed at Lord *Preston*'s trial, which however does not support the distinction taken. But supposing the copy to have been irregularly obtained, that circumstance would only furnish the ground for an application to the discretion of the Court. In *Rex* v. *Brangan* (*c*), the prisoner being acquitted upon an indictment which appeared to have been brought merely for the purposes of vexation and oppression, his counsel applied to the Court for a copy of the indictment, *Willes*, C. J. acknowledged that the prosecution bore the strongest marks of being unfounded and malicious, but refused the application, because it was not necessary that he should grant it; declaring, that by the laws of this realm, every prisoner, upon his acquittal, had an undoubted right and title to a copy of the record of such acquittal, for every use they might think fit to make of it; and that after a demand of such copy had been made, the proper officer might be punished for refusing to make it out.

Scarlett, A. G. contrà. The defendants are entitled to have the rule made absolute upon a very narrow ground.

(*a*) 2 Stra. 1122. (*b*) *Ante*, i. 275. (*c*) 1 Leach, C. C. 32.

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The fiat was obtained under a misapprehension as to the view taken of the case by the learned judge who tried the cause. Upon that mistake being discovered, the plaintiff ought to have gone again before the attorney-general, and have discussed the merits of the application. The plaintiff has received a copy of the indictment upon a representation which appears at least to be founded on mistake. If, as contended on behalf of the plaintiff, he has a right to have a copy of the indictment, this rule will not prevent him.

Lord TENTERDEN, C. J.—Upon the whole we think the mistake or misapprehension not to be of such a nature as to justify the interference of the Court.

Rule discharged.

REECE v. GRIFFITHS and others.

Where in trespass the defendant justifies under mesne process, and the plaintiff replies a detention after a bail-bond given, an actual arrest must be proved; proof of the execution of the bail-bond, coupled with the admission of the trespass in the special plea, is not sufficient.

THIS was an action of trespass and false imprisonment brought against the sheriff of Herefordshire, his under-sheriff, and bailiff. The defendants pleaded, first, not guilty; secondly, a justification under a latitat against the plaintiff. Replication, by way of new assignment, that the sheriff accepted a bail-bond from the plaintiffs, which bail-bond he kept in his possession until and at the time of the trespasses newly assigned. The defendants pleaded not guilty to the new assignment.

At the trial before *Vaughan*, B. at the last Hereford assizes (*a*), the learned judge held that the plaintiff was bound to produce and to prove the execution of the bail-bond; upon which the plaintiff called the attesting witness, *Moss*, a sheriff's officer. Upon his cross-examination, *Moss* stated that the attorney for the now plaintiff came to him and desired, that if he knew of any writ against *Reece* he would

(*a*) Counsel for the plaintiff, *Talfourd*; for the defendant, *Campbell*.

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inform him of it, and he would put in bail. Upon the latitat in question coming to the sheriff's office, *Reece* was not actually arrested, but he executed a bail-bond. The witness swore that he did not take the bail-bond absolutely, but subject to approval upon inquiring into the circumstances of the bail. Upon this it was contended by the plaintiff that the replication had been made out. The learned judge was, however, of a different opinion, and directed a nonsuit, which

Talfourd now moved to set aside. The first arrest is admitted on the record. It is also admitted by the execution of the bail-bond.

Lord TENTERDEN, C. J.—It has lately been decided in this Court (*a*), that merely entering into a bail-bond does not constitute an arrest. One arrest is admitted on the record; but unless the plaintiff proved two arrests (*b*) he was not entitled to recover, and that he has failed in doing.

Rule refused (*c*).

(*a*) *Berry* v. *Adamson*, gent. 6 B. & C. 528; 2 C. & P. 503. And see *Bridgett* v. *Coyney*, *ante*, i. 211.

(*b*) The plea confesses one arrest under the latitat. The replication states a second arrest after the acceptance of the bail-bond.

(*c*) In this case it would appear that the plaintiff must have failed under the general issue.

WILLIAMS *v.* ————.

ASSUMPSIT on a promissory note for 375*l.*, drawn by the defendant, payable to the order of *Wade*, and by *Wade* indorsed to the plaintiff. At the trial before Lord *Tenterden*, C. J., at the sittings at Guildhall after last Trinity term, the plaintiff, who was a pawnbroker, rested his case upon proof of the defendant's signature of the note and of the indorsement,

In an action on a promissory note, a declaration made by the plaintiff before he became the holder, is evidence to invalidate the note.

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On the part of the defendant it was shewn that the note in question had been given in substitution for a former note given upon a gaming transaction. At the time the former note became due it was in the hands of one *Christie*, and before the plaintiff had any thing to do with the substituted note, in a conversation between the plaintiff and the witness, the plaintiff stated the consideration for the drawing of the former note. It was objected, on the part of the plaintiff, that this evidence was inadmissible, inasmuch as the plaintiff was a stranger to the note declared on at the time of the supposed admission. The learned judge, however, received the evidence, and the defendant obtained a verdict, which

Gurney now moved to set aside. The ground upon which the unsworn declarations of parties have been received in evidence to defeat an action upon a bill of exchange, is, that the declarations have been against the interest of the party making them. Here the plaintiff, at the time of the alleged conversation, had no interest in the transaction, and was under no inducement to speak with accuracy. No relation existed between the plaintiff and the defendant until this note was indorsed over.

Lord TENTERDEN, C. J.—The declaration was made prior to the plaintiff's receiving the note; and on that ground I thought it admissible.

The other Judges concurred.

Rule refused.

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COLLEY *v.* HARDY.

Where the sheriff has neglected his duty, the Court will not enlarge the time to return the writ, although the judgment creditor and the assignees of the defendant refuse to indemnify.

IN August last the defendant's goods were seized by the sheriff of Middlesex, under a *fi. fa.*, founded on a judgment by confession. On the 28th of October a commission of bankruptcy issued against the defendant. The assignees gave notice of the bankruptcy to the sheriff, and claimed the goods. On the other hand, the plaintiffs had, before the bankruptcy, repeatedly urged the officer to sell. The sheriff having been unable to obtain an undertaking from either party, obtained a rule to shew cause why the time for making his return should not be enlarged.

Campbell now shewed cause. The officer not having proceeded to sell as requested, has placed the plaintiff in a dangerous position, under the 108th section of the bankrupt act. The difficulty in which the sheriff was placed arises entirely from his own neglect of duty. The Court will therefore not interfere to assist him.

Holt, in support of the rule. The sheriff requires nothing but the ordinary protection which the Courts give where both parties refuse to indemnify. The commission did not issue till October, but it is highly probable that an earlier act of bankruptcy will be set up, the validity of which the sheriff ought not to be drawn in to contest.

Lord TENTERDEN, C. J.—There is no reason to suppose that a prior act of bankruptcy could be established. It was the duty of the sheriff to sell. The officer, who for this purpose is the sheriff, was required to sell, the plaintiff having an obvious interest in an early sale, his judgment being founded upon a cognovit, and therefore within the 108th section of 6 *Geo.* 4, c. 16. The sheriff having neglected his duty is not entitled to the assistance of the Court (*a*).

Rule discharged.

(*a*) *Vide Notley* v. *Buck*, *ante*, ii. 68; *S. C.* 8 B. & C. 160.

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WOOD *v.* SMITH (*a*).

"I believe the mare to be sound, but I will not warrant her." The vendee may declare in assumpsit, as upon a warranty that the mare is sound to the best of the vendor's knowledge.

ASSUMPSIT. The declaration stated, that in consideration the plaintiff would buy a mare of the defendant, the defendant undertook and faithfully promised the plaintiff that the mare was sound to the best of his knowledge. Breach, that at the time of the promise the mare was unsound, as the defendant then and there well knew. At the trial before Lord *Tenterden*, C. J. at the sittings at Westminster after last Trinity term, it appeared that when the plaintiff sold the mare, he said, "I believe the mare to be sound, but I will not warrant her." The unsoundness being proved, it was objected, on the part of the defendant, that the action should have been in tort upon the deceit. The learned judge was of opinion that the representation made at the time of sale was part of the contract, and directed a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

Gurney now moved accordingly. The contract is misdescribed in the declaration, which does not notice the qualifying words, "but I will not warrant her." This is a case in which it was peculiarly proper to bring tort, and not assumpsit, *Williamson* v. *Allison*, (*b*) *Dobell* v. *Stevens* (*c*).

Lord TENTERDEN, C. J.—No doubt the action might have been in tort.

PARKE, J.—The words omitted do not qualify the contract.

BAYLEY, J.—The defendant means to say I will not give a *general* warranty.

Rule refused.

(*a*) S. C. at Nisi Prius, 4 Carr. & Payne, 45.

(*b*) 2 East, 446.

(*c*) 5 D. & R. 490; 3 B. & C. 623.

1829.

SWAYNE *v.* INGILBY, Bart.

A plaintiff nonsuited for want of formal proof, will not be relieved upon payment of costs.

ASSUMPSIT by indorsee for not accepting a bill of exchange drawn by *Ward*, a miner engaged to go to Mexico by a mining company in London, upon whom the bill was drawn. The plaintiff having failed in proving a presentment at the office of the drawees, at Pinner's Hall, was nonsuited. *Gurney* moved in the beginning of this term to set aside the nonsuit on payment of costs, upon an affidavit stating that before the bill became due the drawees had broken up their original establishment at Pinner's Hall, and had removed their business to the office of one *Gregson;* and that an application for payment had been made at *Gregson*'s when the bill became due. A rule nisi was granted upon payment of costs, but it was directed not to go into the new trial paper.

Denman and *Chitty* now shewed cause. The plaintiff is not concluded by this nonsuit, and it is contrary to the practice of the Court to relieve a plaintiff from costs occasioned by his own negligence.

Gurney, contrà. This rule being subject to the payment of costs, which will give the defendant the costs of the trial, it is better for both parties that the previous costs should not be incurred again.

Lord TENTERDEN, C. J.,—The plaintiff must seek his remedy by a fresh action. It is a general rule not to grant a new trial upon affidavits of the witnesses as to matters of fact. It would be dangerous to encourage such an application.

The other judges concurred.

Rule discharged.

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DICKINSON *v.* VALPY.

To make a party liable to third persons as a partner, he must either be in fact a partner, or must have held himself out to third persons as a partner.

The appropriation of shares in a mining association to a party at his request, the payment of an instalment on those shares, attendance at the counting-house of the association, and there signing some deed (not produced at the trial), and subsequent attendance at a general meeting of the shareholders (his conduct, at which he is not allowed to shew) do not prove a party to be a partner:—

Whether *A.*, who has been induced by fraud to enter into a partnership, can set up that fraud against his liability to a party who became a creditor, without knowing *A.* as a partner, *quære.*

ASSUMPSIT. The declaration stated, that the defendant and divers other persons, under and by the description of "The Cornwall and Devonshire Mining Company," by one *Rowland Wilks*, their agent in that behalf, on the 20th day of March, 1826, at &c., according to the usage and custom of merchants, made their certain bill of exchange in writing, bearing date &c., and then and there directed the said bill of exchange to certain persons, by the name, style, and description of "The Cornwall and Devonshire Mining Company, Lombard Street, London," and thereby, two months after the date thereof, required the said last-mentioned persons to pay to the order of one Mr. *Thomas Teague* 300*l.* value received, as advised; which bill of exchange the said drawees, by one *John Wood*, their agent in that behalf, afterwards, to wit, on &c., at &c., upon sight thereof, accepted, according to the said usage and custom, payable at the house of certain persons in the said acceptance mentioned, to wit, at Sir *William Kay*, *Price*, & Co., bankers, London; that *Teague* indorsed the bill to the plaintiff; that the bill was duly shewn and presented for payment, when due, to, and at the house of, the said Sir *William Kay*, *Price*, & Co., bankers, London, but that the said last-mentioned persons did not, nor did the drawees pay, whereof defendant had notice, whereby defendant became liable and promised. The second count described the defendant alone as drawer. The third count described the defendant as sole drawer, but stated the bill to be directed to the defendant and others. The fourth count stated, that

The directors of a mining association cannot bind the members by accepting a bill of exchange, unless they are authorized so to do by the deed or instrument of copartnership, by the necessity of such a power to the carrying on of the business, by the usage of similar establishments, or the express assent of the party sought to be charged. Still less can the directors bind the members by a bill drawn upon the directors by their own servant, such a bill being in effect a promissory note.

certain persons, under and by the style, firm, and description of "The Cornwall and Devon Mining Company," drew upon the defendant, who accepted. The fifth count described the instrument as a promissory note drawn by the defendant under and by the name and description of "The Cornwall and Devonshire Mining Company," by one *Rowland Wilks*, the defendant's agent in that behalf (*a*). The declaration also contained the usual money counts. Plea, non assumpsit. At the trial before *Burrough*, J., at the Bridgewater assizes, 1827 (*b*), the following facts appeared:—Several persons used to meet at a counting-house in Lombard Street, under the firm of "The Cornwall and Devonshire Mining Company," and carried on business to a considerable extent. On the 6th of April, 1825, they received from the defendant the following letter:—

"6th April, 1825. 6, Brunswick Square.

"Gentlemen,—I shall feel obliged for 30 shares in the Cornwall and Devonshire Mining Company.

(Signed) *A. J. Valpy*."

In consequence of this letter a communication was made to the defendant. When persons applied for shares, they paid the money to the bankers for the concern, and took receipts. In July, 1825, the defendant brought two bankers' receipts to the office of 50*l.* each, and applied to have them exchanged for shares or certificates. He then paid 10*l.* more on each share, and executed a deed. The certificates were filled up with the defendant's name, but were never

(*a*) Considering a bill drawn by a party upon himself as a promissory note, the instrument seems to be complete as soon as it is drawn. It seems, therefore, to be properly described as a note made by the agency of the clerk who drew the bill, and not as made by the agency of the clerk who accepted it. If, indeed, the acceptance were so framed as to alter the terms of the contract, it would seem to be, in point of law, a note made by the double agency of the clerk who drew the bill, and of the clerk who wrote the acceptance.

(*b*) Counsel for the plaintiff, *Wilde*, Serjt., *C. F. Williams*, and *Carter*; for the defendant, *Crowder*, *Merewether*, Serjt., who was with him, being absent at Maidstone.

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called for by him, or sent to him. The defendant only attended at the office or counting-house when he delivered in the receipts and signed the deed, and at a meeting of shareholders in July, 1826. At the special meeting of the directors of the company on the 16th of March, 1826, the following minute and resolution were entered in their books: "It was reported by the mine cashier and accountant that a balance of 834*l.* 2*s.* 2*d.* remained due to Captain *Teague*, for advances made by him to the company, as appears by the account submitted to the committee and approved; and Captain *Teague* stated to the committee that he desired to receive bills to that amount:—Resolved, that the mine cashier and accountant draw bills on the company for the amount in favour of Captain *Teague*, and that the secretary be authorised to accept the bills for the directors on behalf of the company, and to make them payable at Messrs. *Kay, Price* & Co., the London bankers of the company." Bills, for one of which this action was brought, were drawn in pursuance of the above resolution. The bill declared upon was in the following form:—

"No. 27. £300. Redruth, March 20, 1826.

"Two months after date pay to the order of Mr. *Thomas Teague* three hundred pounds, value received, as advised.

"For The Cornwall and Devonshire Mining Company,

"*Rowland Wilks.*

"To The Cornwall and Devonshire Mining Company, Lombard Street, London.

"Accepted, for The Cornwall and Devonshire Mining Company, *John Wood*, Secretary."

The meeting of the 7th of July, 1826, was the first meeting of shareholders. The defendant attempted to shew, by the cross-examination of the plaintiff's witnesses, that the defendant attended this meeting merely for the purpose of protesting against his liability as a member of the association, on account of the fraud in which the scheme had been originally concocted; and he proposed to go into evidence of such fraud. The learned judge refused to

permit the cross-examination or to receive the evidence tendered, unless it could be shewn that the plaintiff himself was privy to the fraud. The jury having found a verdict for the plaintiff,

Scarlett, A. G., in the following term, moved for a rule to shew cause why a nonsuit should not be entered, or a new trial had, upon the following grounds:—First, that the evidence of the object for which the defendant attended the meeting in July, 1826, viz. to disclaim the partnership as a fraud, had been improperly stopped. Secondly, that the learned judge had ruled, that the fraud in which the association might have been concocted could not be gone into unless it could be brought home to the plaintiff. Thirdly, that this was not such a partnership as would entitle the parties to bind one another by the drawing of a bill of exchange. Fourthly, that the drawing of such a bill was prohibited by the bank act (*a*). Fifthly, that the instrument declared on was not a bill of exchange, nor was it a promissory note assignable under the statute (*b*). A rule having been granted upon all these points, cause was now shewn by

C. F. Williams. It is admitted on the part of the plaintiff, that the defendant's counsel wished to cross-examine the plaintiff's witness as to what took place at the meeting in July. But that meeting was after the bill in question had been drawn, in fact, after it had become due. It was shewn, and not disputed, that the plaintiff was a bonâ fide holder. The defendant knew the directors, and took receipts from them, thereby admitting that they constituted the executive of the company. [*Parke*, J. It was proved that the defendant paid 50*l*., but it does not appear that he got any certificates.] The certificates were made out, but the defendant never called for them. [Lord *Tenterden*, C. J. It is said that the defendant signed the deed, but it is not said

(*a*) 39 & 40 *Geo.* 3, c. 28, s. 15. (*b*) 3 & 4 *Anne*, c. 9.

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what deed.] The deed was in their hands. [*Bayley*, J. There is no proof of that. Positive assertion leads to no result.] There is no suggestion that the defendant could not produce the deed. The plaintiff is not fixed with knowledge of any improper proceeding either in the original concoction of this mining speculation, or in the representations under which the defendant was induced to become a partner. It was not the fault of the directors that the defendant did not call for his certificates. The defendant finds that the company is in a perilous state, but he has no right, on that ground, to look back to the motives of some of the original projectors. [Lord *Tenterden*, C. J. The name of the defendant is not held out.] There are many great concerns in which the names of the individual partners do not appear. [*Bayley*, J. But then you make out a partnership aliundè.] A partnership deed is not necessary, *Alderson* v. *Clay* (*a*). [*Bayley*, J. There, probably, the party acted as a partner.] The defendant has recognized the respectability of the directors.

Follett, on the same side. Upon the first point, namely, that it was not sufficiently proved that the defendant was a partner, it is submitted that no greater evidence of that fact could be required from the plaintiff, who is a stranger, than was actually adduced by him to shew that he was a partner, and that he held himself out to the world as a partner. [*Parke*, J. Holding himself out to the world as a partner, is only evidence that he so held himself out to the plaintiff. It is merely evidence from which a jury may infer that credit was given to the defendant.] A judge would not hesitate to direct a jury, that if the defendant so held himself out to the world, he so held himself out to the plaintiff. The evidence of the defendant's interference was very strong. After attending a meeting, he writes, asking for shares. That, it is submitted, is an act done by him for the purpose of becoming a member of the association.

(*a*) 1 Stark. N. P. C. 406.

He pays his money and obtains a receipt, expressing that it is paid on account of shares. On taking that receipt to the counting-house he became a member of the association. Then he attends a meeting and pays a further sum of money. How would the matter have stood if this had not been the case of a joint stock company? and there was no evidence that it was. Suppose three persons agreeing to work a mine, and a fourth applies to them to join them, pays money in respect of his share, and attends meetings of the concern, would not such application, payment and attendance be sufficient evidence of partnership? Some members were there in April, on which occasion the defendant also attended. He left the receipts to be exchanged for other documents; he paid an additional sum at the counting-house. All this would, in an ordinary case, have afforded ample evidence of a partnership as regarded a stranger. It would be impossible for him to go further, and produce documents establishing the partnership. No jury could hesitate to presume a partnership under such circumstances. Then it can make no difference what the object of the partnership is; the object here was trading in ore. *Vice* v. *Lady Anson* (*a*) does not go to the length relied on by the other side. In that case there was no evidence that the defendant had gone to the counting-house. [*Bayley*, J. She had received her certificates, paid her deposit, and represented herself as a partner.] The certificates were not shewn to have been issued by proper authority, and that circumstance was relied on in Lord *Tenterden*'s charge to the jury, in which he also says that it does not appear that the defendant's name was registered. Actions for goods supplied to mines are of constant occurrence on the western circuit, and no evidence is ever given to fix the shareholders with an interest in the soil: no such evidence could be produced. The ordinary course is this:—The cost-book of the mine is produced, and it is shewn either

(*a*) *Ante*, i. 113; 1 Mood. & M. 96; reported also as to other points 7 B. & C. 409.

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that the defendants attended meetings of the adventurers, or that their names are entered in the cost-book. If further evidence of interest was required, the plaintiffs must in every instance fail, the adventurers never taking any interest by deed. [*Bayley*, J. There it is shewn that the defendants participate in the profits.] This class of cases was referred to merely for the purpose of answering the objection, that it is not shewn that the defendant had an interest in the soil. Then this case has been likened to the farming of an estate, which does not subject the parties to the operation of the bankrupt laws. It appears to be immaterial to the present question whether adventurers in mines are subject to the bankrupt laws or not, but it would rather seem that they are so. *Eden, B. L.* 4. *Crawshay* v. *Maule* (*a*). [*Parke*, J. All the cases were considered in *Heane* v. *Rogers* (*b*), in which case it was held, that where a trader purchased materials for brick making, he was liable to the bankrupt laws.] But it is not necessary to shew that this defendant was liable to the bankrupt laws. In *Crawshay* v. *Maule*, Lord *Eldon*, C. says, "It is said that this is only the case of tenancy in common of a mine, if so, I think the doctrine with respect to land would apply, and not the doctrine with respect to trading partnerships; but a very difficult question may arise, whether, if the parties, being originally tenants in common of a mine, agree to become jointly interested in the manufacture of its produce for the purpose of sale, they continue mere tenants in common of the mine; still more, if not only carrying the produce of their own mine to market, they become purchasers of other property of a like nature to be manufactured with their own. On such a case in bankruptcy it might be a question whether they were purchasers for the mere purpose of better bringing to market the produce of their own mine, or for the purpose also of bringing a distinct subject to market as traders."

(*a*) 1 Swanston, 513. (*b*) *Ante*, iv. 486; 9 B. & C. 577.

And in *Jeffreys* v. *Smith* (*a*), his lordship says, "The case I alluded to was one before Lord *Hardwicke* in 1737, and it probably did not occur to Lord *Thurlow*, when he expressed his doubt as to the interference of this Court in cases of trespass. Lord *Hardwicke*, in that case, says, 'that a colliery is to be considered in the nature of a trade (*b*); and where persons have different interests in it, it is to be regarded as a partnership; and that the difficulty of knowing what is to be paid for wages and the expenses of management, gives the Court a jurisdiction as to the mesne profits which it would not assume with respect to other lands. On this ground, and on account of the peculiarity of this species of produce, the Court gives an injunction against trespass, and allows a party to maintain a suit for the profits which in other cases it would not do. Here there are twenty shares, and if each owner may employ a manager and a set of workmen, you destroy the subject altogether; it renders it impossible to carry it on. It appears to me, therefore, upon general principles, without reference to the particular circumstances of any case, that where persons are concerned in such an interest in lands as a mining concern is, this Court will appoint a receiver, although they are tenants in common of it.'"

In *Storey* v. *Lord Windsor* (*c*), it was held, that a colliery was a trade, and that the adventurers were therefore entitled to an account in equity. So in *Jesus College* v. *Bloom* (*d*), the digging of mines was said to be a sort of trade, entitling parties to the same remedy as in other kinds of trading. If necessary, therefore, this association might to a certain extent be considered as a trading company. [*Bayley*, J. You do not shew a participation of profits]. There were no profits; but ore was raised by the persons whom the defendant met at the counting-house. A resolution was

(*a*) 1 Jac. & W. 298.

(*b*) *Vide Storey* v. *Lord Windsor*, 2 Atk. 630, and cases there cited; *Sayer* v. *Pierre*, 1 Vez. sen. 232; Belt's Suppl. 127.

(*c*) 2 Atk. 630.

(*d*) Ambler, 54, 56.

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entered into, authorizing the drawing of these bills. [*Parke*, J. It does not appear that the defendant saw the book.] If there was enough to fix him as a partner, it will be presumed that he had access to the book. [*Parke*, J. Supposing the act of drawing this bill to be out of the legal scope of the authority of the directors, there must, in order to charge the defendant, be not only a subsequent knowledge but a subsequent ratification.] The party has the opportunity of inspecting the book, and no disclaimer is shewn. It would be incidental to such a partnership to draw bills. One partner is supposed to be authorized to do acts necessary to the carrying on of the trade. It is not a necessary consequence of all partnerships, nor would such an authority exist, when it would be contrary to the original agreement between the parties. [*Bayley*, J. Can it be necessary for the association to act before all the money is received?] The drawing of bills is as necessary in their case as in that of any other trade. [*Bayley*, J. If it be put on the principle of necessity, must you not shew that the necessity existed?] It is not put upon the necessity of drawing this particular bill. How is a stranger to know whether the necessity exists in the particular case or not. It is not necessary that the trading should be such as would bring the association within the operation of the bankrupt laws, in order to enable it to draw bills of exchange. If the trade can be carried on more easily with the power than without it, such a power will be presumed. [*Bayley*, J. Here it appears there were to be 10,000 shareholders.] That circumstance does not appear to affect the question of authority. *Perring* v. *Hone* (*a*), was a much weaker case than the present. Though it is not mentioned in the report, the argument turned upon the evidence of the plaintiffs having got rid of their scrip. [*Bayley*, J. There the plaintiffs affirmed their being members by selling.] Here the defendant was a party contributing. [*Bayley*, J. In

(*a*) 4 Bingh. 28.

Perring v. *Hone* the plaintiffs were parties to the original undertaking.] In *Ellis* v. *Schmœck* (*a*), the defendants purchased the scrip after the company had been formed. It is stated in the marginal note, that the goods had been furnished after the defendants had become holders of the scrip; but from the case itself it appears that that statement applies only to part of the sum for which the plaintiff sued and recovered. [*Parke*, J. Have you a right to take advantage of the meeting in July? You could not be entitled to use that fact without allowing the defendant to explain his conduct upon that occasion. *Bayley*, J. You did in effect use it.] If there was sufficient evidence aliundè, the Court would not grant a new trial merely on this ground (*b*). [*Parke*, J. It is impossible to say whether the jury would have come to the same conclusion if that evidence had neither been excluded nor explained.] If the defendant became a partner by fraud, still, being a partner, he was liable. Suppose bankers represent themselves as solvent, when they are certainly otherwise, and by such fraudulent representation induce a person to join them, that person would still be a partner, and liable to any engagements which the firm might afterwards contract, unless notice of the fraud is brought home to the plaintiffs; and it is immaterial, as far as he is concerned, under what circumstances the partnership was formed.

Scarlett, A. G. contrà. One fact has not been adverted to, namely, the consideration given by the plaintiff for this note. There being fraud in the concoction of the note, it lay upon him to shew from whom he took it. [*Parke*, J. That point does not appear to have been made at the trial. Lord *Tenterden*, C. J. You ought to have desired that point to be left to the jury if you meant to take that objection.] I consider that it makes the point as to the fraud stronger, but I pass by that. In order to make the defendant liable in this action, he must have held himself out

(*a*) 5 Bingh. 521.
(*b*) *Vide S. P. acc. Doe* d. *Lord Teynham* v. *Tyler*, 6 Bingh. 561; 4 M. & P. 377.

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as a partner, or he must have been a partner. It was objected under the bank acts that it was not competent to these parties to draw a bill. [*Parke*, J. There was no evidence of any custom of other companies to draw bills, therefore it must be left as a question of law. Lord *Tenterden*, C. J. I think there must be an authority to draw bills, but it is quite a distinct question whether the directors had authority to bind the company by issuing this instrument. If the execution of the deed was one mode of shewing that the defendant was a partner, it lay on the plaintiff to produce that evidence.] Without question the directors might bind themselves, but if they can bind the shareholders by any bills which they may choose to draw, such a power would be so full of mischief, yet it was not left to the jury. [Lord *Tenterden*, C. J. My only doubt is whether there should be a nonsuit or a new trial.] If the law furnishes no proof of authority the plaintiff must be nonsuited, unless he produces the proof. It is a great deal too much to say that the directors have power to bind by accepting bills. It may be competent for them to bind shareholders for goods ordered for the mine, whether they are general partners or only in respect of the particular transaction. Part-owners of ships may bind one another for repairs, not by accepting bills. So, joint occupiers of land. *Greenslade* v. *Dower* (*a*). In that case, though a partnership existed, it was held not to be such a partnership as to entitle one to bind the other by accepting bills. Here the partnership was limited to certain operations; nor was it so conducted as to render it necessary that any such power should exist. No presumption therefore of authority is raised.

Lord TENTERDEN, C. J.—Assuming that the defendant was shewn to be a partner, and not merely to have done acts in contemplation of a partnership, it was not proved that he was a member of a company with an authority on the

(*a*) 1 M. & R. 640; 7 B. & C. 635.

part of that company to bind him by drawing a bill. The plaintiff should have shewn that the defendant, by deed or otherwise, had authorized the directors so to bind the shareholders. In the absence of such evidence no authority could be presumed, and there was nothing to fix the defendant with the bill. The plaintiff ought to have been paid in money.

BAYLEY, J.—I am not prepared to say that sufficient was made out to charge the defendant as an actual partner, or as having held himself out as a partner; but that would only go to a new trial. The learned judge has assumed that that was done which amounted to an actual partnership. It should be made out affirmatively that it was such a concern as entitled the directors to bind all the members. The only question for the jury would be, whether in such companies such a power is in constant use, or it is necessary that there should be such power. There was no evidence on either point which would warrant its being left to the jury to find whether such a power was necessary. No evidence was given of what was done in other companies. I apprehend that such a power was not necessary, and that the payments should be made in ready money. To hold otherwise would be to give the directors an unlimited power to pledge the credit of persons who could by no possibility interfere.

LITTLEDALE, J.—There must either be a nonsuit or a new trial. The form of the bill declared on is very unusual. It is not a bill drawn by individuals or by persons carrying on a particular business. Persons taking such a bill had full notice that it was not an ordinary bill. It was therefore incumbent on them to ascertain and to prove that the parties by whom the bill was drawn had authority to bind the shareholders. In ordinary cases there is an implied authority resulting from the relation of partner. That is not the case in a mining company. The nature of the association should have been shewn.

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In the case of a farm it is not competent for one joint owner to bind his companion by drawing a bill of exchange. The object of such a partnership is to sell the produce of the farm. It is true that in the course of that business it may be necessary to buy many things, but that does not make it necessary that bills should be drawn. Here, if the nature of this business is in fact such as to render it necessary that such a bill should be drawn, it was for the plaintiff to shew it. A man may be secretary to such an association without having any power to bind the shareholders by drawing bills even with the sanction of the directors. It was not shewn that it was necessary that there should be a power to draw bills, still less to draw bills in this particular form. In order to prove that such a power was necessary in the present case, it was incumbent on the plaintiff to shew the nature of the concern carried on by the defendants, or by others in the same business. The instrument declared on is, in effect, a promissory note; and it would require a great deal of evidence to make out that the shareholders would be bound by a promissory note if they would be bound by a bill. If this point was reserved there must be a nonsuit, if not, a new trial.

PARKE, J.—I am clearly of opinion that there must be a nonsuit if this point was reserved; if not, there must be a new trial, upon more grounds than one. This bill not being accepted by the defendant personally, the plaintiff was bound to shew that the acceptance was given by his authority, or that he has ratified it, notwithstanding the plaintiff may be a holder for a valuable consideration. Here, there was no express authority, and no ratification. But it was contended that an implied authority arose by reason of partnership; and it was said that the defendant held himself out as a partner, and that he was in fact a partner. If the defendant represented himself to the plaintiff as a partner, or held himself out as a partner in such a manner as to lead the jury to infer that the plaintiff gave

credit to the defendant as a partner, the defendant would be liable. But no such representation appears to have been made. Nor was there any evidence that the defendant was in fact a partner. The facts proved are all consistent with an intention to become a partner at a subsequent period upon certain conditions, until the performance of which no partnership would be constituted. Supposing, however, that the defendant was a partner, no authority appears to arise out of the relation of partner in a mining company to draw any more than in that of joint occupiers of land to draw bills of exchange, and certainly never to draw such a bill as this, which is in substance a promissory note. The argument of the plaintiff would go to shew that in a mining partnership each partner, by drawing bills and passing them into the hands of indorsers, might pledge the liability of his co-adventurers to any amount. I offer no opinion upon the question whether the proposed evidence of fraud would have constituted a defence. In contending that such evidence would not affect the plaintiff without shewing him to be conusant of the fraud, it appears to be assumed that he was acting on the belief that the defendant was a partner. If the defendant had made a representation to that effect, the fraud practised against himself would be no answer to this action. But the question here is whether an actual partnership has been formed *as between the parties*, and whether evidence of fraud is admissible to negative the execution of any partnership *inter se*, a question of considerable nicety.

Rule absolute to enter a nonsuit (*a*).

(*a*) See *Bourne* v. *Freeth*, *ante*, iv. 512; 9 B. & C. 632, *S. C.*

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The KING *v.* Sir THOMAS MARYON WILSON, Bart., Lord of the Manor of Hampstead, and WILLIAM LYDDON, his Steward of the said Manor.

The lord of a manor is bound to admit the customary heir of a copyholder in fee, although there be a surrender to the use of a will, and a devise by the surrenderor, there being no claim of admittance on the part of the devisee.

So, although it appear (upon the return to a mandamus) that the non-claim of admittance on the part of the devisee, is the result of a contrivance between him and the customary heir to deprive the lord of the fine which would be payable upon the admittance of the devisee.

In the case of a devise of copyhold surrendered to the use of the will, the estate descends upon the heir, subject to contingency of being devested by the admittance of the devisee.

A MANDAMUS issued to the lord of the manor of Hampstead and his steward, commanding them to admit *Joseph Walmsley*, the heir at law, according to the custom of the manor, of *Henry Flitcroft*, deceased, *to the immediate tenancy* in possession of certain estates held *of the manor* (*a*) by copy of court roll, of which *Flitcroft* had

(*a*) This expression is somewhat incorrect. The copyholds are within and parcel of the demesnes of the manor; they are not held *of* the manor, but are ipsum manerium. Lands held *of* the manor are those lands which having been formerly parcel of the manor were severed from it by subinfeudation before the passing of the statute of Quia Emptores, in 1290 (in the case of a manor held of a subject), or before the statute De Prærogativâ Regis, in 1324 (in the case of a manor held of the crown). These sub-infeoffees became the freehold tenants of the lord, the barons of his curia baronum. (*Vide post*, 155.) Their lands were no longer parcel of the manor, but were held *of* the manor, or, to speak with more precision, they were held of the lord, *as of his manor*, ut de manerio. The services of these tenants are *parcel* of the manor, and so much so, that if their services be destroyed or severed from the demesnes, the manor has no longer a legal existence. One of these services, namely, the secta ad curiam baronum, is so essentially parcel of the manor that it is said that upon the number of suitor-freeholders being reduced so low that no court baron can be held, the estate ceases to be a manor in law, and is only a manor in reputation. By this expression however, nothing more seems to be meant than this: a court baron is a necessary incident to a manor; if, therefore, the power of holding a court baron be destroyed, the estate, though retaining its manerial character in every other respect can no longer be legally designated as a manor. If, therefore, the lord were to release to his freehold tenants the suit of court, the manor would be as effectually destroyed or reduced to that imperfect state in which it receives the rather inappropriate name of a manor by reputation, as if all the freeholds had escheated, or as if the lord had alienedd his seigniory over these freeholds. Where a manor has become an

No disclaimer by the devisee is therefore necessary to vest the estate in the heir.

A copyhold may be disclaimed by parol, or by other matter in pays.

died seised, besides the estates held of this manor to which *Walmsley* had been already admitted, or to shew cause to the contrary. This writ was founded upon a suggestion, first made by affidavit upon the motion for the mandamus, and afterwards inserted in the writ, that Hampstead is an ancient manor, *within* (*a*) which are various copyhold tenements *parcel of the said manor* (*a*), and granted by and held of (*b*) the lord of the manor, according to the custom of the manor, and demised and demisable (*c*) by copy of

imperfect manor, or a manor in reputation, by the destruction of all the suit-rendering tenements except one (or *perhaps* two), it would seem that the manor would revive whenever the remaining freehold tenement was divided amongst several tenants holding in severalty, or even as tenants in common, since each of these new tenants would owe suit at the court baron, such suit not being a service arising out of *custom*, but a service necessarily incident to a seigniory by the common law. (*Post*, 157). The reduction, therefore, of the number of the freehold tenants to one (or two, if three be necessary to constitute a court baron,) seems rather to create a *suspension* than an extinction of the manor. So, it would appear that the manor would be suspended if the lord made a lease for years of the services of his freehold tenants, as during the term the tenants would owe suit and service at the court of the lessee, who, not being lessee of the demesnes, would not be lord of the manor even during the term.

(*a*) The copyholds are *within* and *parcel of* the manor, *suprà* (*a*).

(*b*) These words would apply to the lands of the freeholders or tenemental lands. With reference to the copyholds they are incorrect.

(*c*) No land can be granted by copy of court roll which has not been *demisable* by copy of court roll from the commencement of legal memory, which, though formerly altered from time to time, has long remained fixed at the coronation of Richard I. (6 July, 1189). If, therefore, it can be shewn that at any time within that period the power of demising has been suspended by the intervention of an estate for life or for years, all subsequent copyhold grants are void. But it is not necessary that the land should have been actually *demised* by copy of court roll. Lands which have always remained in the hands of the lord, or in the hands of his tenants at will, whether by free tenure, at the will of both parties, or by villein tenure, at the will of the lord only, may still retain their customary *dimissibility*, or may still be demisable by copy of court roll. The term "always demised and demisable by copy of court roll" does not appear to be strictly correct. For though the tenant is said to hold by *copy* of court roll, because, the copy is the evidence which he possesses of his estate, yet the demise is by the roll itself, and is antecedent to the copy. Nor does the granting of the copy seem to have

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court roll of the manor by the lord of the manor for the time being, according to the custom of the manor, to any person or persons willing to take the same in fee simple (*a*) or otherwise (*b*) at the will of the lord, according to the custom of the manor, and in which manor during all the time aforesaid the lord of the manor or his steward of the manor for the time being, once or oftener in each year, have held, and still of right ought to hold, customary (*c*) courts of the manor, and have at such courts admitted and ought to admit such persons as have been and are entitled to be admitted as tenants of the customary tenements, and to such interests as they have required and may require, according to the custom of the manor; that *Henry Flitcroft* was in or about the year 1769 duly admitted to certain copyhold tenements parcel of the manor, consisting (among

been coeval with the practice of entering the admittance upon the rolls. The tenants were called "tenants by the rolls of the manor" before they acquired the name of tenants by *copy* of court roll. M. 42 E. 3, fo. 25, pl. 9.

(*a*) Though in point of tenure a copyhold is an estate in villenage, being held at the will of the lord, and not at the will of the tenant also, yet, if the custom warrant such an extension, it may in point of duration of *interest* be held in fee simple. The Cornish villein tenures *in* nativâ *conventione, de septem annos in septem annos*, appear also to have been susceptible of an extension, in point of duration of interest, to a fee simple. These estates, though, like copyholds, not inconsistent with the personal freedom of the tenant, have long since disappeared. The higher species of conventionary tenure, *in* liberâ *conventione, de septem annos in septem annos*, which still subsists, is likewise capable of acquiring a customary duration in fee simple. In copyholds, however, the extension of the original interest in point of duration is noticed in the instrument of grant to which the lord is party; whereas in the Cornish assessionable manors, though the customary tenant surrenders to the purchaser, in fee *according to the custom of the manor*, the surrenderee is admitted, by the duke's commissioners upon the assession roll, merely to the original estate from seven years to seven years, *according to the custom of the manor*, which words seem, in the former place, to point to the septennial *tenure*, and in the latter, to the customary permanence of the *interest*.

(*b*) Where the custom warrants a grant in fee simple, the lord may create any less estate. 4 Co. Rep. 23 a; Co. Litt. 52, b.; 1 Roll. Abr. 511, l. 30.

(*c*) *Vide post*, 143, (*a*).

other things) of a house and 46 acres of land at West End, in the said manor, and a house at Frognall, in the said manor, to hold the same to him and his heirs at the will of the lord, according to the custom of the manor; and that *Flitcroft*, on or about 3d April, 1826, died so seised of the said copyhold tenements, and that *Walmsley* is the heir at law, according to the custom of the manor, of *Flitcroft*; that at a general customary (*a*) court holden for the manor, on or about the eighth day of January 1829, application was made to the steward, by and on behalf of *Walmsley*, to admit him, *Walmsley*, so being heir at law, according to the custom of the manor, of *Flitcroft*, to the said copyhold tenements, as tenant thereof in possession, and that frequent application had since been made by *Walmsley* to admit him to the same copyhold tenements as the right heir and heir at law of *Flitcroft*, according to the custom of the manor; that the steward had refused to admit *Walmsley* as tenant in possession of the said copyhold premises by reason or pretence of a certain alleged surrender made by *Flitcroft* in his life time to the use of his will, and of certain life and other estates alleged to have been devised in and by the will of *Flitcroft* after the time of the said surrender; and that on the twenty-eighth day of May, in the year 1829, at a certain customary court then held in and for the manor, *Walmsley* had attended the said court, and had again requested the said steward to admit him, *Walmsley*, to the said copyhold tenements as tenant in possession, and produced and tendered to the steward a certain disclaimer duly made and executed by *James Fletcher* and *Anna Maria Fletcher*, the only surviving devisees under the said will, whereby they the said *James Fletcher* and *Anna Maria Fletcher* disclaimed, renounced, and relinquished all right and title whatsoever of, in or to the said copyhold tenements; yet the defendants well knowing the pre-

(*a*) The proceedings in this case would take place, not in the Court Baron, which is the Court of the freeholders only, and in which the suitors are judges, but in the Customary Court, at which the copy-

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mises, but not regarding their duty in that behalf, had absolutely refused, and still did refuse, to admit *Walmsley* to the said copyhold tenements as tenant in possession thereof, according to the custom of the manor.

To this writ the defendants returned, that at a court baron (*a*) held for the manor, 8 May, 1769, *Flitcroft* had been duly admitted as tenant to the copyhold tenements holden of the lord of the manor (*b*) and parcel of the manor, to hold the same to him and his heirs at the will of the lord of the manor, according to the custom of the manor, as in the

holders are bound to attend, but in which the steward of the manor is the judge. For the sake of convenience both Courts are generally held at the same time, as is also the Court Leet, where the lord possesses that franchise; but though these three Courts, or any two of them, may, by usage, be held at the same time and place, and the proceedings entered in the same book, they are perfectly distinct and independent.

(*a*) But see the preceding note.

(*b*) Copyholds being part of the demesnes are *parcel* of the manor, and not *held of* the manor, *suprà*, 142 (*a*). The tenemental lands, or lands held by the freeholders of the manor, are not, strictly speaking, *parcel* of the manor, yet as the services of these freeholders are parcel of the manor, and as the lands themselves must have been once part of the demesnes, and are still within the seigniory, such tenemental lands were said (by *Shard*, J.) to be quasi parcel (par maner parcel) of the manor. Fitz. Abr. 12 Ass. 13, Auncien Demesne, pl. 33, which is a more full report than is to be found in the Year Book, 12 Ass. fol. 35, pl. 18. where this dictum is not mentioned.

Much confusion often arises in the use of the terms "within the manor," "within the fee and seigniory of the manor," and "within the ambit of the manor." The first of these terms applies to land in the possession of the lord, or of his leaseholders or copyholders. The second, to lands which, being formerly within the manor, were, before the statute of Quia Emptores or De Prærogativâ Regis, granted by the lord to be held *of the grantor* in fee *as of his manor*. The term "within the ambit of the manor," is applicable to land which, though surrounded by the manor, is neither parcel of the manor nor held of the manor; land which never was connected with the manor in point of tenure, or which, having been formerly within the manor, has been aliened from it in fee, either by a direct conveyance, tenendum of the chief lord of the fee, before or since the statutes, or by a subinfeoffment before the statutes, since followed by an alienation of the seigniory to a stranger, or by a release of the seigniory to the tenant.

said writ is mentioned; and that *Flitcroft* did at such Court, after his admission to the copyhold tenements as aforesaid, duly surrender the same into the hands of the lord of the manor, by the rod, by the hands and acceptance of the steward of the manor, according to the custom of the manor, to and for such uses, intents, and purposes as he, *Flitcroft*, should, in and by his last will and testament in writing, thereof direct, declare, limit, or appoint; that on the 3d day of April, 1826, *Flitcroft* died so seised of the copyhold tenements as aforesaid, having first duly made and published his last will and testament in writing, duly executed for devising copyhold estate, whereby he devised the copyhold tenements to his mother for life, with remainder, after her decease, to the use of *James Fletcher* for life; and from and after the determination of that estate, to the use of trustees in trust to support and preserve, &c.; and from and after his decease to his first and other sons in tail male, with remainder to all and every the daughter and daughters of *J. Fletcher* in tail general; and on failure of issue of *J. Fletcher*, to the use of *Anna M. Fletcher* for life, with like limitations to her issue; and in default thereof to the use of *M. Fletcher* for life, with like limitations to her issue, and the ultimate remainder to the right heirs of *Flitcroft*; that *Lyddon* did, on the 15th day of June, 1827, make search at the Register Office for the county of Middlesex, and on such search did find an entry in such register of the memorial of an indenture of release, bearing date the 24th day of August, 1826, made between *J. Fletcher* of the first part, *A. M. Fletcher* of the second part, and *Walmsley* of the third part; by which release *J. Fletcher* and *A. M. Fletcher*, for the considerations therein expressed, did demise, release, and for ever quit claim unto *Walmsley*, all the copyhold messuages or tenements, lands and other hereditaments, situate and being within and held of (*a*) the said manor of Hampstead, of or to which *Flitcroft* was seised or entitled at the time of making

(*a*) *Vide suprà*, n. (*a*).

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his thereinbefore recited will, and also at his death, with the appurtenances and all the estate, &c.: to hold the said copyhold messuages, &c., thereby released, and every part thereof, to *Walmsley*, his heirs and assigns, for and during all the rights and interests by or under the said will of *Flitcroft* devised to or otherwise vested in *J. Fletcher* or *A. M. Fletcher*, or either of them; to the end and intent the same rights and interests might severally merge and be extinguished in the estate which had descended upon *Walmsley* as customary heir of *Flitcroft*; that *Lyddon* also found on such search another entry in such register of the memorial of another indenture bearing date 25 August, 1826, and made between *Walmsley* of the first part, *A. M. Fletcher* of the second part, and *J. Fletcher* of the third part; by which indenture, in consideration of a covenant entered into by *J. Fletcher* and *A. M. Fletcher* to surrender all their estate and interest in certain copyhold estates of *Flitcroft*, and also in consideration of 2,500*l.* to *Walmsley* paid by *J. Fletcher*, the said *Walmsley*, with the consent and approbation, and at the request of *A. M. Fletcher*, did grant, bargain, sell, alien and confirm, unto *J. Fletcher* and his heirs, all that the remainder or reversion in fee simple, to take effect in possession upon the several deceases of *J. Fletcher* and *A. M. Fletcher*, and failure of the issue of the respective bodies of *J. Fletcher* and *A. M. Fletcher* of and in the therein described lands, tithes and hereditaments in Hendon, and all other the manors, rectories, advowsons, messuages or tenements, lands, tithes, hereditaments and premises whatsoever of *Flitcroft* in Hendon, habendum unto the use of *J. Fletcher* and his heirs; that the said copyhold tenements mentioned in the said indenture of the 24th of August, 1826, and the said copyhold tenements mentioned in the said indenture of the 25th of August, 1826, are the same copyhold tenements, and not other or different, and that they comprise the said copyhold tenements devised by the will of *Flitcroft*; that the supposed disclaimer by the said *J. Fletcher* and *A. M. Fletcher* bears date the 4th of May, 1827, and subsequently to the inden-

tures of 24 and 25 August, 1826, and is colourable only, and was made for the purpose of depriving and defrauding the lord of the said manor of the fines which would have been payable to him on the admissions of *J. Fletcher* and *A. M. Fletcher* respectively to their said life estates in the said copyholds, according to the custom of the manor; that at a general court baron (*a*) held for the manor on the 8th of January, 1827, *Walmsley* was admitted, as the heir of *Flitcroft*, to the immediate tenancy in possession of the copyhold estate in the manor, late of *Flitcroft*, not surrendered to the use of his will, and that *Walmsley* was so admitted by *Lyddon*, the steward of the said manor, from his erroneous belief that the said copyhold estate did not pass by the devise in the said will, because it had not been surrendered to the use of *Flitcroft's* will, and therefore descended to *Walmsley* as heir, and that *Walmsley* was admitted to the same estate upon no other ground than that the same had so descended to him; that within the manor there now is, and from time whereof &c. hath been, a certain ancient and laudable custom there used and approved of, that is to say, that when a customary tenant has surrendered a customary tenement of the manor to the use of his will, and has afterwards devised the same to any person or persons for life or in tail, with remainder to any other person or persons for life or in tail, or in fee, such devisee or devisees has or have been admitted by the lord of the manor to the same for or according to the estate or interest, or respective estates or interests of such devisee or devisees therein. And these are the causes, &c.

Long, for the prosecutor of the mandamus. Upon this writ and return five points are raised for the consideration of the Court. First, on the death of *Flitcroft* the estate descended to his heir. Secondly, on the neglect of the devisees to come to be admitted, and more especially after their disclaimer, the heir had a right to be admitted.

(*a*) *Ante*, 143 (*a*).

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Thirdly, the deeds of 24th and 25th of August, 1826, did not take away the right of the heir to be admitted. Fourthly, the amount of the fines payable to the lord in respect of the admission of *Walmsley*, cannot be gone into upon a return to a mandamus. Fifthly, the custom stated in the return does not vary the right of the heir. On all these grounds *Walmsley* is entitled to a peremptory mandamus. On the death of *Flitcroft*, the estate of which he died seised vested in his heir, *Roe* d. *Jeffereys* v. *Hicks* (*a*). In that case *Joseph Jeffereys* surrendered to the use of his will, and devised to his niece *Elizabeth*, who was attainted and executed for the murder of her uncle, and it was held that the estate descended upon the heir of the uncle, and that the niece, who was not the heir, had nothing to forfeit to the lord. In the case of a surrender to the use of a will, the estate remains in the surrenderor and his heir until the admittance of the devisee, *Smith* v. *Triggs* (*b*). A surrenderee cannot devise before admittance. The cases which shew that where there is an intermediate life estate, the estate does not descend, are not disputed. Here, in whom would the estate be, if it did not descend? In no case can there be any thing like an abeyance of the copyhold. As soon as one person ceases to hold, another becomes tenant. The estate descends, but liable to be divested upon the admittance of the surrenderee. Secondly, if the devisee do not choose to take the tenancy upon himself, either the lord has a right to compel the heir to be admitted, or the heir has a right to assume the tenancy. Here there is a distinct disclaimer. In *Townson* v. *Tickell* (*c*), a disclaimer

(*a*) 2 Wils. 13; 1 Ken. 110.

(*b*) 1 Stra. 487.

(*c*) 3 B. & A. 31, overruling *Butler* and *Baker*'s case, 3 Co. Rep. 25, upon the supposed authority of *Bonifaut* v. *Greenfield*, Cro. El. 80, which turned upon the wording of a particular act of parliament, and of *Thomson* v. *Leach*, 2 Ventr. 196, the judgment in which case, in accordance with that given in *Townson* v. *Tickell*, was reversed in the House of Lords. For a full account of the proceedings in *Townson* v. *Tickell*, and the peculiar circumstances attending that case, *vide ante*, iv. 189, (*a*). And see Litt. Sect. 685; Co. Litt. 360, n.; *Doe* v. *Smyth*, 6 B. & C. 112; 9 D. & R. 136.

by deed, by the devisee of a freehold estate, was held to be sufficient to divest the estate. The present case is stronger, because in a copyhold the estate does not vest in the devisee by the will, which only operates as a designation of the person entitled to be admitted under the surrender. In *Townson* v. *Tickell*, Lord *Tenterden* says, "the law is certainly not so absurd as to force a man to take an estate against his will." *Holroyd*, J. says, "that even a parol disclaimer would be sufficient," relying upon *Bonifaut* v. *Greenfield* (*a*). This will apply with still greater force to the case of copyholds. In the case of the devise of a freehold, the devisee becomes seised upon the death of the devisor, by force of the Statute of Wills. A plausible argument is raised in *Townson* v. *Tickell* in favour of the necessity of a disclaimer in a Court of record, but that objection was overruled. In *Wainwright* v. *Elwell* (*b*) it was held by *Plumer*, V.C. that the devisee of a copyhold surrendered to the use of the will of the surrenderor could not devise. [*Bayley*, J. A surrenderee cannot surrender before admittance, *Doe* d. *Tofield* v. *Tofield* (*c*).] Thirdly, the deeds of 24th and 25th of August, 1826, do not take away the right of the heir to be admitted. An equitable interest is assignable, and it would be strange if the interest of the devisee of a copyhold could not be got rid of. The second deed (*d*) states a transaction which is partly in the nature of a sale and partly in the nature of an exchange. The lord has nothing to do with either of these deeds, and cannot take advantage of the arrangements effected by them, whatever question they may give rise to between the heir and the devisees in a Court of equity. The heir has given a valuable consideration for the release of the surrenderees.

(*a*) Which merely decided what should amount to a refusal of the office of executor, and what should (not divest an estate, but) prevent an estate from vesting, which was made dependant upon the acceptance of such executorship. See this case stated and examined, *ante*, iv. 190, n.

(*b*) 1 Madd. 627.

(*c*) 11 East, 246.

(*d*) 25 August, 1826, *ante*, 146.

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Fourthly, no question as to the amount of fine can arise until after admittance (*a*). [This was conceded on the other side.] Fifthly, the customs set out pervade all copyhold manors. [*Comyn.* It is not admitted that the lord cannot compel the devisee of the surrenderor to come in and be admitted tenant. *Bayley*, J. The custom stated is in effect, that the lord may compel the devisee to come in, and may seize *quousque*.] If the devisee be not compellable to come in, the heir must come in, as the lord must not lose his tenant. These rights are reciprocal.

Comyn, contrà. It is the right and the duty of the lord to see that he has a proper and legal tenant admitted to the copyhold. All will resolve itself into a question whether the heir has a right to be admitted tenant *in possession*. It is submitted that he has no such right, because the estate has not descended to him though heir, and he is only entitled upon failure of all the intermediate estates. He is heir at law in remainder. The lord is bound to see that a proper person is admitted tenant. [*Bayley*, J. What authority is there for that proposition?] It requires none. [Lord *Tenterden*, C. J. The question is the same as if the surrenderor had devised away in fee.] Until the death of the appointees, the heir has no estate. The heir can have no estate until the life estate is extinct and upon failure of issue in tail. [*Bayley*, J. He does not claim under the remainder, but as heir of the person last seised, no other person appearing to claim to be admitted.] The lord knowing that another person is entitled, is bound to hold the estate for the party entitled. It is merely colourable and fraudulent in *Walmsley* to claim as heir, when he has a secret deed from the persons interested under the devise. The cases cited to shew that a party is not bound to take an estate against his will, do not apply. There is no doubt but that such party may disclaim, but it is denied that the devisee has a right to claim an interest, and to convey that interest clandestinely to the heir, for the pur-

(*a*) *S. P. Bacon* v. *Flatman*, cited 4 Co. Rep. 28, a.

pose of getting rid of the liability of the devisee to be admitted. [*Bayley*, J. What right has the lord but to have a tenant? The estate remains in the surrenderor and his heirs until the surrenderee comes in to be admitted. If the surrenderee surrender before admittance, he conveys no estate of which a Court of law can take cognizance. So if such surrenderee devise before admittance.] The writ does not state that the claimant is heir at law of the estate. [*Bayley*, J. It alleges that *Flitcroft* died seised, and that *Walmsley* is heir according to the custom, upon which *the law* says that he is heir of the estate.] He is not heir at law *of* this estate, but he is entitled under the intermediate devise. [*Parke*, J. The estate must be taken to descend, until the contrary be shewn.] The mere neglect of the tenants for life to come in does not affect the rights of these parties. The Court will not say that the lord *shall* have a tenant although he has no right to refuse to admit the proper tenant.

Long, in reply, was stopped by the Court.

Lord TENTERDEN, C.J.—By the common law the estate is in the surrenderor and his heirs until the surrenderee comes in to be admitted. Here the estate descended subject to the right of the appointees to come in and claim admittance. When they declare that they will not come in, that obstacle is removed. If the effect of the deeds were to shew that the devisees were taking a benefit under the will, and that a loss accrued to the lord by the arrangements made between these parties, the lord must proceed in another way. We have only to see whether the heir has a right to be admitted.

BAYLEY, J.—The Court is bound to look to the legal title. The lord has a right to have a person in whom the legal estate is, admitted on the roll, and that person has a right to be admitted. The estate is in the surrenderor and

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in his heirs until the devisee, who is the surrenderee designated by the will, comes in. Until he comes in, the estate is in the heir, who now claims to be admitted, not in respect of his reversion, but in respect of his immediate estate. *Flitcroft* died seised, therefore the estate descended. The heir may bring trespass; which shews that the estate descends upon him. Except as against the lord, the heir would have the whole estate in him. The admittance is for the benefit of the lord. The lord cannot seize or make proclamations, except for the purpose of placing himself in a situation to do what the mandamus requires, and it is only when he has so done that he will be entitled to the fines. My only doubt was, whether the heir could obtain a mandamus, because the right of possession was in him before. But that doubt is removed by the case of *Rex* v. *The Brewers' Company* (*a*).

LITTLEDALE, J.—I am of the same opinion. It is not necessary to consider what fines the lord is entitled to receive. If this is, as has been insinuated, a scheme and contrivance to do that which the law does not sanction in defeating the claim of the lord to new or greater fines, the lord must have his remedy either by action or by bill in equity. Here the legal estate is to be considered as if it were a case of ejectment. It is the same thing whether the surrenderor makes a will or not; and it is clear that if the surrenderor die without making a will, the estate descends to the heir. If the life estates created by the will be disclaimed, it is the same thing as if they had never been limited. In some manors the custom requires that the presentment be made at the next Court; in others, that it be presented within the year. The situation of the parties is the same as if the appointees had not chosen to come to the next Court, or at the Court at which they were entitled to be admitted, except that the disclaimer makes the case still stronger. The effect of the disclaimer is to place the parties in the same situation as if no devise had been made.

(*a*) 4 D. & R. 492; 3 B. & C. 172.

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PARKE, J.—I am of the same opinion. The question lies in the narrowest possible compass. Not a single authority has been cited to impugn the grounds upon which this writ was obtained. Upon the death of the surrenderor the estate descended to the heir, who has a right to a mandamus to admit him, he taking his chance whether the devisee will apply to be admitted. Any difficulty is, however, removed by the disclaimer of the devisees; though I think that without a disclaimer the heir would have been entitled to be admitted. If a fraud has been practised upon the lord, he has his remedy in another shape (*a*).

Legal definition of a manor.

(*a*) A manor is commonly said by the text writers to consist of demesnes and services. This is rather a statement of some of the incidents of a manor, than a strict legal definition. On the other hand, persons who are not lawyers frequently comprehend under the term manor, circumstances which have no necessary connection with this species of estate. Thus the right to wastes within the district over which the manor extends, is frequently called a manerial right; though the right of the lord to such wastes, where there has been no actual possession, rests merely upon the presumption that they belong to the lord as the present owner of the demesnes, and as the ancient owner of the tenemental lands, by which these wastes are surrounded. The same presumption would arise in favour of any other owner of an extensive district enclosing wastes. So, the seigniory of copyholds is frequently an incident to a manor; but there are many manors in which this species of tenure does not appear to have ever existed, and still more in which it has been long extinct; and though no copyholds unconnected with a manor exist at the present day, the custom of demising by the lord's rolls appears to have formerly been common to every lord who had demesnes which were held in villenage. So, the right to have a Court-Leet is a royal franchise, under which the grantee holds a court of criminal jurisdiction in the king's name, over the resiants (residents) within a particular district. This privilege may be granted to persons who are not lords of manors; and where the grantee has a manor, the limits of the manor and of the leet are not necessarily co-extensive. So, except in the case where a grant of free warren or free chase is annexed to a manor, the lord has no other privilege in respect of *game*, than the power given by modern statutes of appointing a gamekeeper. With this, however, is frequently confounded the advantage derived from the presumption of ownership over extensive wastes, which has already been shewn to have no necessary connection with *manerial* rights. A correct legal definition of a manor,

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the terms of which nothing can be added to or taken from, it would be difficult, if not impossible, to find in our text writers. An attempt to supply this apparent omission may not be considered to be misplaced. *A manor consists of demesnes and an appendant mesne seigniory over freeholders, qualified, in respect of quantity of estate, and sufficient, in point of numbers, to constitute a Court-Baron.*

Mansion-house, how far necessary to a manor.

Formerly there could be no manor without a mansion-house (manerium, manoir) at which the services were due and might be tendered and from which this peculiar species of estate derived its appellation (Maseres, Historiæ Anglicanæ Selecta Monumenta, 256, n.). At the present day the demesnes may, and very frequently do, consist entirely of land; and there may be a good legal manor, although the mansion-house, or the spot on which it stood, (usually described as the scite (site) of the manor,) have been aliened from the manor; (and see *Winter* v. *Loveday*, 5 Mod. 382; Owen, 81; 4 Inst. 268;) or it cannot be *now* shewn that any mansion ever existed on the land; though it would seem that no estate could ever have acquired the name of a manor without possessing a mansion-house on the demesnes. Before the statute of Quia emptores terrarum, 18 *Edw.* I. cap. 1 & 2, when seigniories might be created at pleasure by unlimited sub-infeudations, the existence or the non-existence of a *seigniory* at any particular period would be an immaterial circumstance in comparison with the lord's *mansion*, by services to be performed or tendered at which the subtenure was distinguished. And see Plowd. 169; Fulb. Par. 18 a, b; Maseres, Hist. Angl. Sel. Monumenta, 255 n; Appendix to 3d Report of the Common Law Commissioners, B. 20.

Demesnes necessary to a manor.

The demesnes are an integral and necessary part of the manor; for if the lord alien all the demesnes, his remaining estate will not be a manor, but a seigniory in gross, a species of estate very common in the earlier periods of our legal history, but now practically almost unknown in England, though still subsisting, in a somewhat similar form, under the name of superiorities, in Scotland (*a*).

The demesnes are those lands of which the lord is seised, whether they are in his own occupation, or in that of his tenants at will, or for years. Of these the former have either a customary estate, as holding at the will of the lord, according to the custom of the manor, or they have a common law estate, holding at the will of both lessor and lessee. The tenancy for years is, in modern times, usually a common law estate, though in the assessionable manors, parcel of the duchy of Cornwall, customary estates for years are still subsisting. (*Rowe* v. *Brenton*, ante, iii. 133, 143, b. 243, 310, 311, 313, 314, 315, 316, 318, 326, 357, 358, 362, 363; Mann. Exch. Pract. 2d edit. 357, n.) If the lord of a manor were to make a gift in tail or a lease for life, of all the demesnes, there would, during the continuance of the particular estate, be no demesnes within the manor. The services of the freeholders of the Court-Baron would not be appendant to the demesnes, but to the reversion of these de-

(*a*) The French *fiefs en l'air*.

Superior Court-Baron in Isle of Wight, called Knighten-court.

mesnes expectant upon the determination of the particular estate. During the continuance of this state of things it would seem that the lord would have, not a manor, but a double seigniory in gross, one in respect of the donees in tail or lessees for life, the other in respect of the ancient freehold tenants of the manor. And see *Hartop* v. *Tuck*, Hetl. 14; *Bracebridge* v. *Coote*, Plowd. 422, b.

Services necessary to a manor.

To constitute a manor there must not only be demesnes, but also, appendant thereto, a seigniory over freeholders. And this must be a *mesne* seigniory (*a*); since no freeholder, holding in capite, can, in respect of the same freehold, hold of a manor; and, *e converso*, the king cannot, *jure coronæ*, be lord of a manor (*b*). These freeholders, we have seen (*c*), constitute the curia baronum, the word baron having been formerly synonimous with freeholder (*d*). In order to determine that a particular district constitutes a manor, it must be ascertained that a person seised of land within that district is also seised of the services of two or more other freeholders of inheritance within the same district, and that the seisin of the land and the seisin of the services of the freeholders have, *for any thing that can be shewn to the contrary*, been united ever since the statute De Prærogativâ Regis, if the land be holden immediately of the crown, or since the statute of Quia emptores, if the land be holden of a subject.

(*a*) 2 Inst. 501.
(*b*) *Estwick's* case, 12 Co. Rep. 136.
(*c*) *Ante*, 143.
(*d*) In Germany barons by tenure, and in later times, *some* of the titular barons are called *free* lords, *freyherren*.

In honors or very extensive manors, a distinction appears to have been drawn between the greater and the lesser barons, the former only being acknowledged as the pares curiæ. The Isle of Wight was granted by King *Stephen* to W. de Redvers, and was surrendered by his descendant, Isabella de Fortibus, to King *Edward* I. in 1293. During the 150 years that this honour was in the hands of a subject, the freeholders holding immediately under the lord of the island, owed suit and service at the lord's court. Those tenants however only were summoned who held to the extent of a knight's fee (*e*). Hence the Court was not simply Curia Baronum, but Curia Militum; and it still exists (*f*), (by the name of the *Knighten Court*; the suitors being those who hold of the king, as of his castle of Carisbrook, (the *manerium* of the island) to the value of 20*l*. per annum (*g*). It does not appear that the machinery of these Courts has proceeded so far as to allow of the lesser barons appearing by a select portion of their number, as in the great Court-Baron of the realm.

So much importance attached to the possession of a mansion-house, at which the services of tenants might be rendered, that a villein who had a mansion upon his villenage, might grant portions of his villenage

(*e*) Knight's fees were usually either manors or seigniories in gross, T. 16 *E* 3, *Inner Temple MS.*; M. 17 *E.* 3, fo. 8, pl. 10.
(*f*) Now held within the borough of Newport, but *for* the whole island.
(*g*) From the documents produced at the trial of the case of *Mayor, &c. of Newport* v. *Saunders*, Winchester Spring Assizes, 1832, *cor. Park*, J.: And see Sir R. Worsley's History of the Isle of Wight.

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to be holden of him as of his *manerium*. The estate of the grantor, consisting of this mansion-house and the ungranted portions of the villenage, in *demesne*, and of the *services* of the granted portions of the villenage, was called a *customary* manor (*a*). See Sir *Henry Nevill's* case, 11 Co. Rep. 17; *Moore* v. *Goodgame*, Cro. Jac. 327; *Rex* v. *Stanton*, ib. 259; *Rex* v. *Stafferton*, 1 Bulstr. 54.

Power of crown to create a manor.

It has been said (*Morris* v. *Smith*, Cro. El. 38, arg.; Shower, 142, arg.) that the king cannot, at this day, create a manor. And this is perfectly true; because the king never could create a manor. If before the statute De Prærogativâ Regis the king had granted land to *A.*, the grantee might have sub-infeoffed *B.*, *C.*, *D.*, *E.*, and *F.* of parcels of the land, retaining the rest in his own hands, or in the hands of his tenants for years or at will. *A.* would then have had a manor; but this manor could not be said to be created by the crown, as the king could not create the sub-tenure, by which the manor was constituted.

Power of subject to create a manor.

So, since the statute De Prærogativâ Regis, if the crown grant land to *A.*, and either at the time of the grant or subsequently, license *A.* to sub-infeoff *B.*, *C.*, *D.*, *E.* and *F.*, of parcel of the crown grant, the effect would be the same as before the statute, that statute making no other alteration in the law than imposing the necessity of obtaining a licence for sub-infeudation. Even in land which not being held immediately of the crown, falls within the provisions of the statute of Quia Emptores, there appears to be no other obstacle to the creation of a new manor than the necessity of obtaining the licence as well of the crown as of all intervening lords. Thus Lord *Coke* says, (2 Inst. 501,) "these general words *ita tamen quod feoffatus teneat terram illam seu tenementum illud de capitali domino feodi illius* have a tacit exception, viz. unless all the lords, mediate and immediate, do assent thereunto, for *quilibet renunciare potest beneficio juris pro se introducti.*" (And see Co. Litt. 99, d.) The language of the stat. De Prærogativâ Regis is, "*nullus qui teneat de Rege in capite per servicium militare poterit alienare majorem partem terrarum suarum, ita quod residuum non sufficiat ad faciendum inde servicium,* SINE LICENTIA REGIS." In the printed statutes the following words are added, which evidently form no part of the act. "*Sed hoc non consuevit intelligi de membris et particulis terrarum earundem.*" It seems also to be questionable whether, as the language of the statute De Prærogativâ Regis is "qui tenet de Rege in capite per servicium militare," its provisions are not become inoperative by the abolition of military tenures. If so, then inasmuch as the statute of Quia Emptores does not extend to lands holden in capite, but speaks of the "*emptores terrarum et tenementorum de feodis* MAGNATUM *et aliorum dominorum, in præjudicium eorundem,*" (*b*) it will follow that a freeholder holding in capite may at this day, without

(*a*) Another species of customary manor might, and may still, be created by a grant or a demise to a stranger of the seigniory of all the copyholds, or of all the copyholds within a certain district. 4 Co. Rep. 26, 7.

(*b*) And see 1 Tho. Co. Litt. 527, n. (I.); 2 Tho. Co. Litt. 211, n. (A.)

licence, make a sub-infeoffment or grant land in fee simple to be holden of himself, as he undoubtedly may do *with* the licence of the crown, under the express provisions of the statute De Prærogativâ Regis, if the land be holden in capite, or with the licence of the lords mediate and immediate, under the implied, or, as Lord *Coke* calls it, the *tacit* exception in the statute of Quia Emptores, where the lands are holden of a subject. *Holmes* v. *Hanks*, 12 Mod. 494. The position of Mr. Baron Maseres (Hist. Angl. Sel. Mon. 256, n.) and of others (*Morris* v. *Smith*, Cro. El. 38, 39; *Marsh* v. *Smith*, 1 Leon. 26) that "it has been impossible to create a new manor ever since 1290," appears, therefore, to be expressed too generally. It is said indeed in an original case in Brooke, (Bro. Abr. *Compris*, pl. 31,) to have been held in 33 *H.* 8, that a man cannot create a manor by granting estates tail to hold by service of suit of court, *because a court cannot be but by continuance cujus contrarium, &c.*; but a Court-Baron appears to be incident to tenure at common law, requiring neither grant nor prescription to uphold it. *Rex* v. *Stafferton*, 1 Bulst. 54; *S. C.* per nomen *Rex* v. *Stanton*, Cro. Jac. 260; *Brown* v. *Goldsmith*, F. Moore, 870; *Pell* v. *Sowers*, Noy, 20; Co. Litt. 58, a.; 2 Inst. 43; Maseres, Hist. Angl. Sel. Mon. 256, n.; *ante*, 140, (*a*).

Before the statute of Quia Emptores a tenant in fee simple might have created a tenure under himself as large, in point of duration, as his own estate; and in the case of an entry upon the sub-tenant in fee for a forfeiture before or since the statute, the lord is said to be in *of his reversion*. So, upon judgment of ouster, for non-performance of the services reserved, in a writ of Cessavit per biennium, F. N. B. 208, Fitz. Abr. 20 *Edw.* 2, Brief, pl. 826, though the statute (6 *Edw.* 1, c. 4,) says nothing about reverting or reversion. So, the writ of escheat, which is at common law, is "*quæ ad ipsum* reverti *debet tanquam escaeta sua.*" F. N. B. 144.

Power of termor to create a sub-tenancy during the whole term.

As the statute of Quia Emptores does not affect chattel interests, it seems to be not unreasonable to contend that a termor may create a sub-tenancy equal, in duration, to his own term, and that, as in the case of a sub-tenure in fee, the sub-lessor has such a reversion as will enable him to distrain for the rent or other services reserved upon the creation of the sub-tenure. To entitle a lessor to distrain, it is necessary that he should have a reversion to which the rent may be incident, Litt. sect. 215. By the term reversion, is meant the returning of the estate to its original owner. During the particular estate upon which the reversion is expectant, the reversion is the expectancy of such return; after that estate is determined, the reversion is the land itself so returned, Plowd. 158, b.; *ib.* 160. But to constitute a *reversionary* interest, it is not necessary that a particular estate be so limited that the land will *certainly* return to the party creating the limitation or to his representatives. It is sufficient if the estate *may* so return; as in the case of a sub-tenure in fee simple, Litt. sect.

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216, Plowd. 159, or in fee tail, Litt. sect. 18, Plowd. 159, it never being questioned but that a donor in tail might distrain, though the contingency of the failure of the estate tail seems at one period to have been considered too remote to entitle the heir of the donor to devise the reversion under a custom to devise lands, 31 Ass. fo. 185, pl. 3. A distinction is indeed sometimes made between a reversion expectant upon an estate tail or other less estate, and the contingent interest of the lord in the case of a sub-tenure in fee by calling the latter "a right of *reverter*;" but this distinction is of little consequence, either being sufficient to support a distress.

This principle appears to be equally applicable to the case of a term of years created by a party who holds for a term, of the same duration in point of express limitation, but which it may *possibly* exceed. It is the common practice to limit an estate to *A.* for life, remainder to *B.* during the life of *A.*; which remainder consists in the expectancy of the possible determination of *A.*'s estate by forfeiture or otherwise, during the life of *A.* Now if this be a valid limitation, so that on a forfeiture by *A.*, *B.*'s remainder shall vest in possession, it seems difficult to say that if *B.* were afterwards to make a new lease for life to *A.*, *tenendum* of *B.*, *B.* would not have as good an estate in reversion as he had before in remainder. With respect to sub-tenures in fee simple and in fee tail no question seems to have been raised. But as some doubt has been thrown upon the right of the sub-lessor for years to distrain where the secondary term is for the same period as the primary, it may not be improper to examine the cases in which this point has come before the Court.

The earliest mention of this subject is in P. 45 *E.* 3, fo. 8, pl. 10. That was an action of debt brought by a party who had only a chattel interest, (the wardship of an heir,) against his lessee, for arrears of rent. The defendant pleaded, that the rent would not be payable till the end of the term. In overruling this plea, *Finchden*, C. J. says, "If I be seised of certain lands and let them to a man for a term of years rendering 40*l.* per annum, I may have an action of debt for each term (*a*), and I may also distrain, but if I have only a term of years, and I let to you *my estate* of the term rendering to me certain rent, I believe (jeo croy) that I cannot distrain. SED QUÆRE; wherefore answer over." This is the whole of the dictum as it stands in the Year Book; and it is thus abridged, or rather altered, in Bro. Abr. title Distress, pl. 7, "Nota per *Finch.* arguendo. If a man has lands for years, and grants all his term rendering rent, he cannot distrain; but if he grant part, he can distrain, 45 *E.* 3, 8." And in his title Dett, pl. 39, after stating the decision with respect to the action of debt, Brooke adds, "And in that case it is admitted (conceditur) by *Finch.* that if a man has land for years, and grants *all the term*, rendering rent, he cannot distrain."

(*a*) Which was the point in dispute.

This dictum seems to have been first brought before the Court, in —— v. *Cooper*, 2 Wils. 375. "In "replevin, the defendant avows un- "der a distress for rent due from "the plaintiff to him, upon an *as-* "*signment* of a lease of a term for "years to the plaintiff, in which "assignment there is no clause of "distress; the single question is, "whether this is such a rent for "which a distress lies, there being "no reversion in the defendant. It "was said for the defendant, that "although rent be incident to the "reversion, yet it is not an inse- "parable incident, and therefore "it may be severed from the rever- "sion; and although there is no "clause of distress in the assign- "ment of the term, yet the rent "reserved thereupon may be con- "sidered as a rent-seck, and dis- "trained for by the statute 4 *Geo.* "2, c. 28, sect. 5, and that it ap- "pears clearly to be the intent of "the parties that the plaintiff "should pay rent to the defendant. "This case was so clear, that the "Court gave judgment for the "plaintiff without hearing his coun- "sel. *Curia*: There are two ways "of creating a rent; the owner of "the lands either grants a rent out "of it; or grants the lands and re- "serves a rent; there is no such "thing as a rent-seck, rent-service, "or rent-charge issuing out of a "term for years(*a*). Bro. Dette, pl. "39, *cites* 43 *Ed* 3, 4 (*b*), per *Fynch-* "*den*, Ch. Justice, C. B. 'If a man "hath a term for years, and grants "all his estate of the term, ren- "dering certain rent, he cannot "distrain if the rent be in arrear;' "This case is law, and in point; "therefore, if the avowant will "recover what is owing to him "from the plaintiff, he must bring "his action upon the contract. "Judgment for the plaintiff per "totam curiam." In *Palmer* v. *Edwards*, 1 Dougl. 187, n., *Edmonson*, the lessee, expressly *assigned* to *Warner* (the party under whom the plaintiff claimed) at the yearly rent of 26*l.* 2*s.* *payable to Edmonson*, and it was held by *Buller*, J. and *Willes*, J. that the conveyance from *Edmonson* to *Palmer* operated as an assignment, and not as an underlease. These two decisions appear to be unquestionable. A lessee *may assign* his term, and if the assignee be accepted as tenant he cannot reserve rent-service, though he may *create* a rent-charge or a rent-seck. (Litt. sect. 217.) So, if before the statute of Quia Emptores, the tenant in fee had made a feoffment, *tenendum* (not *de se*, but) *de capitali domino feodi* (*a*), no rent-service could have been reserved upon such feoffment. But where a termor, whether lessee or assignee, indicates no intention to part with the term, and thereby determine the privity of estate between himself and the lessor, there appears to be neither principle nor authority to preclude such termor from making an *underlease* for a period commensurate in point of computation with the original term.

This appears to reconcile all the cases prior to 1818, including the *decision* in *Poultney* v. *Holmes*, 1 Stra. 405, in which it was held

(*a*) Quære.

(*b*) Brooke cites correctly 45 *E.* 3, 8.

(*a*) This could be only where the entire property was aliened. Where a *part* was aliened, the alienee must have held of the alienor. Hence the interminable mesnalities of the 13th & 14th centuries.

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that when a termor agrees that another shall *have the premises for the remainder of the term*, paying the termor the same rent as was reserved upon the original lease, such an agreement must be taken as a lease and not as an assignment, because the reservation was to the lessee and not to the original lessor. In that case, however, it seems to have been inconsistently, and as it would appear, gratuitously, admitted on the part of the original lessee, that he could not distrain *for want of a reversion*.

Thus stood the law till 1818, when the case of *Parmenter* v. *Webber*, 8 Taunt. 593, and 2 J. B. Moore, 656, was decided in the Court of Common Pleas. That was an action of replevin, in which the defendant avowed, first, for one year's rent, and, secondly, for half a year's rent; plea in bar to both avowries, non tenuit. It appeared that the avowant being lessee for years, under two several leases, entered into a written agreement with the plaintiff, by which the plaintiff was to have (not the leases, but) the two farms during the leases thereof, and to remain tenant to the avowant during the said leases. It was contended by the plaintiff, that the agreement operated as an absolute assignment of the avowant's interest in the two farms, and that having thus parted with the reversion, he could not legally distrain (*a*). In giving judgment, *Dallas*, C. J. says, "I am of opinion that, "according to the legal effect of the "agreement, it amounts to an ab- "solute assignment by the defend- "ant, so as to operate as a *surren- "der* (*b*) of the whole of his "term under the two leases in "question. In —— v. *Cooper*, it "was expressly determined that a "lessee for years, who assigns his "term, cannot distrain for rent. "And although in this case the "plaintiff has paid the defendant "one year's rent, and he was to "remain tenant to the latter during "the leases, still as the defendant "had parted with his interest, I "think the plaintiff is entitled to "judgment." This was followed by the case of *Preece* v. *Corrie*, 2 Moore & P. 57. That was an action of replevin, in which the defendant made cognizance as bailiff to *White* under a demise from the 11th of November, 1826. The plaintiff pleaded in bar, first, non tenuit; secondly, that by the supposed demise in the cognizance mentioned, *White* demised and granted the premises to plaintiff for the residue and remainder of his, *White's*, estate, term, and interest of and in the same; and that he, *White*, had not then, or at the time when, &c. or at any time during the supposed demise to the plaintiff, any reversionary estate, term, or interest of, or in, the premises or any part thereof, expectant, or to take effect, upon, or at any time after, the expiration of the term granted to the plaintiff by the said supposed demise. The defendant joined issue on the first plea, and replied to the second, that by the demise in the cognizance mentioned, *White* did not demise and grant the premises to the plaintiff for all the residue and remainder of *White's* estate, term,

(*a*) *Vide post*, 161, 2.

(*b*) Quære.

and interest of and in the same, in manner and form as the plaintiff had in his second plea in that behalf alleged: and on this issue was joined. At the trial it appeared that *White*, being tenant for a term expiring the 11th of November, 1836, by an agreement in writing, 23d January, 1826, agreed to give up possession of the farm to the plaintiff in consideration of his paying the value of the growing crops then belonging to *White*; and the plaintiff was to hold the farm for the remainder of *White*'s term at the same rent that *Eastwick* paid; the rent to commence and be payable by the plaintiff from the 11th of November then past; but it was provided, that in case the plaintiff should not be enabled to pay for the crops by the 1st of May, 1826, *White* might retain the farm for the remainder of the term; that on the 11th of September following, the plaintiff, by bill of sale, assigned all the growing crops and effects on the farm to *White*, and that afterwards, and in the course of the same day, *White* agreed verbally with the plaintiff, in the presence of two witnesses, that he would become tenant to *White* from that day till the 11th of November following, at the rent of 270*l*., payable in advance immediately. The jury found that there was a demise from *White* to the plaintiff, and secondly, that *White* had parted with the whole of his term; and the verdict was entered for the plaintiff. A motion was made to set aside this verdict, on the ground that the demise had been found upon the first issue, and that the plaintiff had not, under the second issue, proved that *White* had granted all his estate to the plaintiff, and had no reversionary interest after the expiration of the plaintiff's term. The Court of Common Pleas held that the finding of the jury on both issues was proper, *on the ground that though the demise to the plaintiff amounted to an under-lease, yet White could not distrain for want of a reversion*. And see 5 Bingh. 24, *S. C.*

The result of the cases appears to be this—In 1371, a judge, while deciding in favour of the right of a guardian in chivalry, who had let his ward's lands during the whole period of the minority, to bring an action of debt for the rent toties quoties, as it accrued, which was the only question before the Court, expresses a doubt as to the right of a termor to distrain after he has *let all his estate of the term*. In an abridgment of this case, published in 1573, it is stated to have been *admitted* by that judge, that a man who grants all his term, rendering rent, cannot distrain. The doubt thrown out in 1371, improved into a *conceditur* in 1573, is in 1768 cited as a decided case no longer to be impugned or examined. The authority thus oddly obtained is applied however in 1768 to the case of a termor who has absolutely assigned his term, and who, therefore, according to every legal principle and analogy, would have no reversion of any kind, and consequently no right to distrain. But in 1818 and 1828 the doctrine is extended to an *underlease*; whereby an entirely new principle has been introduced into the law of tenure with respect to leasehold interests; the cases of *Parmenter* v. *Webber* and *Preece* v. *Corrie*

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appearing to decide that a rent reserved upon a tenure under the party to whom the rent is payable, and which is therefore a rent-service (Litt. sect. 213), may exist without a power of distress incident thereto. The point arose incidentally in *Burton* v. *Barclay*, 7 Bingh. 745, but it became unnecessary to notice it in the judgment. And see *Hicks* v. *Downling*, 1 Salk. 13, less distinctly reported 1 Lord Raym. 99; *Wilston* v. *Pilkney*, 1 Ventr. 242, and 2 Lev. 80; *Curtwright* v. *Pinkney*, 1 Ventr. 272; *Newcomb* v. *Harvey*, Carth. 161; *Smith* v. *Mapleback*, 1 T. R. 444. Should it be considered that the analogy between a grant in fee, tenendum of the grantor, and a grant by a termor for the whole duration of the term, tenendum of the grantor, cannot be maintained, inasmuch as the termor is, or originally was, rather the *bailiff* than the *tenant* of the freeholder, still it is conceived that the right to distrain for the rent reserved, may be supported upon another and a distinct ground. Where *A.* being possessed of land for a term of 20 years, demises and leases that land for 20 years to *B.*, rendering rent to *A.*, his executors, administrators, and assigns, it is evidently the intention of the parties, to be collected from the instrument itself, that *A.* should have the ordinary remedies of a landlord for the recovery of the rent reserved. If then, by the rules of law, the demise can only operate by way of assignment, *A.* cannot obtain the consideration for that assignment unless the rent be treated as a rent-*charge*.

See further as to the origin of manors Cragii Jus Feud. lib. i. tit. 10, § 2.

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Yeast is a *victual* within the exception in 50 *Geo.* 3, c. 41, (Hawkers' and Pedlars' Act.)

AT the Quarter Sessions for the county of Derby, a conviction under 50 *Geo.* 3, c. 41, was confirmed, subject to the opinion of this Court on the following case:—

The defendant, who had been for some time past in the habit of purchasing yeast at Burton, and carrying the same about to the neighbouring towns and villages, and selling it for the purpose of being used in the making of bread and beer, took a quantity of yeast to Litchurch, in the county of Derby, on the 14th November, 1828, and there exposed the same to sale in his usual way, without a hawker's licence. The question for the opinion of the Court is, whether the yeast so exposed to sale is to be considered as victuals within s. 23 of 50 *Geo.* 3, c. 41 (*a*).

(*a*) By which it is provided and enacted, "That nothing in this act shall extend to prohibit any person or persons from selling (inter alia) any fish, fruit, or *victuals*."

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N. R. Clarke, in support of the Order of Sessions. Yeast is not *victuals*, by which must be understood that which is in a state fit to be eaten; it is merely a substance used in the preparation of victuals. *Rex* v. *Waddington* (*a*) was cited below for the defendant. There, however, it was not necessary to consider this point. In *Rex* v. *M'Gill* (*b*) it was held, that selling tea as a hawker required a licence. [*Bayley*, J. That was prohibited by a former statute.] The Court said it was a double offence. Yeast is not victuals in common parlance. It is not even an ingredient in a victual, but merely a substance applied to cause fermentation, and thereby render the bread lighter.

Fynes Clinton, on the same side. *Rex* v. *M'Gill* is quite conclusive. Hops would seem not to be within the 5 & 6 *Edw.* 6, c. 14 (*c*). In the case of *Rex* v. *Waddington*, however, it was determined, on looking at the words of that act, that as growing corn could not be treated as victuals, the words of the statute must be considered as shewing the intention of the legislature, that every thing which might in any shape become victuals should be included in the prohibition against forestalling. Here, the word victuals is found in company with fish and fruit only; which shews that nothing was intended to be exempted, except that which is sold in a state fit to be used as food.

Brodrick, contrà. Yeast is a victual within the meaning of this act; it comes from one victual, and forms a necessary ingredient in another. *Rex* v. *M'Gill* was a case depending upon the construction of 10 *Geo.* 1, c. 10, s. 14, and 9 *Geo.* 2, c. 35, s. 20. The restrictions in these statutes upon the sale of tea, rendered it impossible that that

(*a*) 1 East, 143.

(*b*) 3 D. & R. 377; 2 B. & C. 142.

(*c*) Which prohibited the engrossing of "any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, within the realm of England, with intent to sell the same again." Repealed by 12 *Geo.* 3, c. 71.

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article should be exempted from the operation of the Hawkers' and Pedlars' Act; nor was the exception urged. Beer and wine are considered as victuals by 12 *Edw.* 4, c. 8. By 12 *Edw.* 4, c. 8, beer is expressly made a victual. [*Bayley*, J. Whatever contributes to the support of life is a victual.] By 55 *Geo.* 3, c. 99, yeast is recognized as an ingredient in making bread. In 3 *Inst.* (*a*) it was adjudged that salt is a victual, because it not only is necessary itself for the food and health of man, but that it seasoneth and maketh wholesome beef, pork, &c., butter, cheese, and other viands. To hold that yeast is not within the exception, would have the effect of imposing a most inconvenient restriction upon the sale of an article of very general use.

Lord TENTERDEN, C. J.—The word "victuals" in this statute may fairly be understood to comprise every thing which constitutes an ingredient in food, and to extend, therefore, to this article, which is generally, though not, perhaps, necessarily, used in the making of bread.

BAYLEY, J.—*Rex* v. *M'Gill* was a case totally different from the present. It was not there agitated whether tea came within the exception in the 23d section of the Hawkers' and Pedlars' Act. I do not think that tea would come within that exception, because the sale of tea, under such circumstances, was already illegal. The true construction of this section has been pointed out by my lord.

LITTLEDALE, J., concurred.

Order of Sessions quashed.

(*a*) 195.

BIGNELL *v.* ELLIS. 1829.

ASSUMPSIT for money had and received. Plea, non assumpsit; and issue thereon. At the trial before *Garrow*, B. at the last spring assizes at Chelmsford (*a*), the following facts appeared. The plaintiff rented a farm under Colonel *Strutt*, at 140*l.* per annum, and being distrained upon for half a year's rent, and being indebted to one *Rolfe* in 93*l.*, the following agreement was signed by Colonel *Strutt* and the plaintiff:—

"I hereby sell all my property, of whatsoever kind I now possess on the farm I now hold of *J. W. Strutt*, Esq. to the said *J. H. Strutt*, according to the valuation taken before me, and written by Mr. *Robert Ellis*, junior, in my presence, amounting to the sum of 163*l.*; and I hereby authorize the said *J. H. Strutt* to deduct 73*l.* as rent due to him on Michaelmas day next, and to pay over to *Robert Ellis* to hold till the account of *Jacob Bignell* and *George Rolfe*, of Billericay, is settled by their respective signatures, which *Robert Ellis* will pay as far as the sum of 90*l.*; and should the account between the said *George Rolfe* and the said *Jacob Bignell* not amount to the said sum of 90*l.* the balance then to be paid by the said *Robert Ellis* to the said *Jacob Bignell*.

Signed, *J. H. Strutt.*
Jacob Bignell."

Before the 90*l.* had been paid over to *Rolfe*, the plaintiff directed the defendant not to make such payment, but to pay the money to himself. This, however, the defendant refused to do. The learned judge was of opinion that the defendant, as stakeholder, was entitled to hold the money until the account between the plaintiff and *Rolfe* were adjusted. The jury accordingly found a verdict for the defendant. In the following Easter term, *Comyn* obtained a rule nisi for a new trial, against which

Where *A.* agrees to take certain goods of *B.* at a price, partly to be set against a debt due from *B.* to *A.*, and the residue to be deposited with *C.* for the purpose of being paid over to *D.*, when it should be ascertained in what sum *B.* is indebted to *D.*, it is not competent for *B.* to countermand the payment to *D.*, and until the account is taken, *C.* may hold the whole of such residue against *B.*

(*a*) Counsel for the plaintiff, *Comyn* and *Chitty*; for the defendant, *Gurney*.

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Gurney now appeared to shew cause. But the Court called upon

Comyn, in support of the rule. The memorandum of sale is not an agreement between the plaintiff and *Rolfe*, who notwithstanding that arrangement might have sued plaintiff next day. The money in defendant's hands is the money of the plaintiff. [*Parke*, J. That is the point. The question is, whether the transaction was not in effect a purchase by Colonel *Strutt*, at a price partly to be set against the rent and partly to be paid to *Rolfe*. This is, therefore, not like the case of a party putting his own money into the hands of a third person. *Bayley*, J. How does it appear that Colonel *Strutt* would have consented to become the buyer on any other terms?] Here the third party does not, as in *Fairlie* v. *Denton* (*a*), assent to the transfer. [*Parke*, J. If *Rolfe* had assented, there would have been no difficulty, but here *Strutt* is a party.]

BAYLEY, J.—If the plaintiff had any control over the money, *Rolfe* being no party to the agreement, the plaintiff might have revoked the authority to pay him; but that is not the state of things here. The plaintiff has goods which were seized under a distress for rent, and enters into a bargain with his landlord, who is willing to buy the goods at a specified price upon two conditions, namely, that the plaintiff should pay him 73*l.* and should pay 90*l.* to *Rolfe*. The defendant is, by this agreement, constituted a stakeholder between the parties. It was in the option of Colonel *Strutt* whether he would buy or not. What interest he had in protecting *Rolfe*, we do not know; but he might not have chosen to buy without a power to satisfy *Rolfe*. The plaintiff is not at liberty now to turn round and refuse to allow the payment to *Rolfe*, which payment formed the consideration for *Strutt's* purchasing the goods at the price he gave for them. But consi-

dering this as money deposited, it is not deposited by the plaintiff alone, but by plaintiff and *Strutt* jointly, until they came to an agreement. The defendant is justified in retaining the money in his hands.

LITTLEDALE, J.—If this had been a mere power to pay *Rolfe*, it would have been revocable; but that is not the state of things, though it bears some resemblance to it. It must be presumed that *Strutt* would not have bought without this stipulation.

PARKE, J.—I am of the same opinion. I quite agree that if it could be established that this was the money of the plaintiff, he might have reinstated himself, but the goods were sold for money to be paid to *Strutt* and to *Rolfe*. The plaintiff acquires no interest in the money, except a contingent interest in the surplus.

Rule discharged (*a*).

(a) And see *Lyte* v. *Parry*, Dyer, 49, a.; *Taylor* v. *Lendow*, 9 East, 49; *Gibson* v. *Minett*, 2 Bingh. 7; 9 J. B. Moore, 31.

The KING *v.* The TREASURER of the County of the City of EXETER.

Where an indictment for felony is removed by certiorari, and tried at Nisi Prius, neither the Judge at Nisi Prius nor this Court has authority to award costs to the prosecutor under 7 *Geo.* 4, c. 64, s. 22, whether the indictment be removed by the prosecutor or by the prisoner.

COLERIDGE had obtained a rule calling upon the defendant to shew cause why he should not pay to the prosecutor the expenses of the prosecution of an indictment for felony against one *Ellis*. A former application for the expense of a former conviction had been granted.

Crowder now shewed cause. Six indictments were removed by the prisoner, one of which only was tried. At the trial the learned Judge doubted whether he had any power to give the prosecutor his costs. The rule was granted for the costs of that prosecution only; nothing was

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said about the costs of the other five, although they are now included in the rule. The Court has no power to give the prosecutor his costs. The words of 7 *Geo.* 4, c. 64, s. 22, are, "That the Court before which any person shall be *prosecuted or tried* for any felony, is hereby authorized and empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or subpœna to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur," &c. The Judge before whom the felony was tried is the person most competent to form a judgment as to the propriety of allowing costs.

Coleridge, in support of the rule. It is now too late to re-agitate the question whether this Court has authority to award these costs. The provisions of 58 *Geo.* 3, c. 70, s. 4, differ but slightly from the subsequent enactment of 7 *Geo.* 4, c. 64, s. 22. The cases upon 7 *Geo.* 4 are cases of misdemeanour removed by the *defendant.* Even when a bill is thrown out, it is the constant practice to apply for costs. [Lord *Tenterden,* C. J. If we have done wrong before, we will not amend the rule for the purpose of giving you the costs of the other indictments. We have since considered the point. *Littledale,* J. The act only applies to indictments tried before the Courts in which they were found.] This view of the statute would put it in the power of the prisoner to deprive the prosecutor of his costs.

Lord TENTERDEN, C. J.—If the costs of the prosecution could be granted at all, they ought to be granted by the Judge who tried the prisoner.

LITTLEDALE, J.—Even the Judge has no power where the case has been removed by certiorari. There is no difference in substance between an indictment removed by the prisoner and an indictment removed by the prosecutor.

Rule discharged (*a*).

(*a*) And see Ryan & Moody's Crown Cases, 73.

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NIGHTINGALE *v.* WILCOCKSON.

In declaring against the sheriff for an escape upon mesne process, it is sufficient to allege that the writ was duly indorsed for bail, without adding "by virtue of an affidavit made and filed of record."

CASE for an escape against the Sheriff of Cambridgeshire. The declaration, after stating that *Kirke* was indebted to the plaintiffs below in *a large sum of money, to wit, 50l.*, to recover which they had issued a capias against *Kirke*, directed to the Sheriff of Cambridgeshire, averred, that before the delivery of the writ to the sheriff to be executed, the said writ was duly marked and indorsed for bail for 25*l.* and upwards. Averment, that the writ was delivered to the sheriff who arrested *Kirke*, and afterwards suffered him to escape. To this declaration the defendant below demurred specially; assigning for cause that it was not alleged that any affidavit of the cause of action was ever made. Joinder in demurrer. The Court of Common Pleas (*a*) gave judgment for the plaintiff below, whereupon the defendant below brought his writ of error.

Wyburn, for the plaintiff in error, contended, that the declaration does not shew any obligation on the part of the sheriff to arrest *Kirke*, but on the contrary, shews that the sheriff would have been a trespasser in arresting him. *Case of the Marshalsea* (*b*), *Hill* v. *Heale* (*c*), *Rex* v. *Sheriff of Surrey* (*d*). He also cited *Morris* v. *Hayward* (*e*), and *Morgan* v. *Bridges* (*f*). The language of pleadings is to be construed most strongly against the pleader. *Jackson* v. *Pesked* (*g*), *Thornton* v. *Adams* (*h*), *Webb* v. *Horne* (*i*). Secondly, the word "duly" will not supply the want of an allegation of those circumstances which are necessary to render the transaction legal. *Everard* v. *Paterson* (*k*), *Williams* v. *Germaine* (*l*), *Brazier* v. *Jones* (*m*).

(*a*) 4 Bingh. 501; 1 Moore & Payne, 279.
(*b*) 10 Co. Rep. 76.
(*c*) 2 N. R. 202.
(*d*) 1 Marsh. 75.
(*e*) 6 Taunt. 569.
(*f*) 2 Stark. N. P. C. 317; 1 B. & A. 647.
(*g*) 1 M. & S. 234.
(*h*) 5 M. & S. 38.
(*i*) 1 Bos. & Pul. 281.
(*k*) 6 Taunt. 645; 2 Marsh. 304.
(*l*) *Ante*, i. 394, 403; 7 B. & C. 468.
(*m*) *Ante*, ii. 88; 8 B. & C. 124.

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Russell, Serjt. contrà. The declaration contains a sufficient averment that the statute has been complied with. Before 12 *Geo.* 1, c. 29, a defendant might have been arrested for any sum without an affidavit. By that statute it is enacted (*a*) that no person shall be held to special bail upon process issuing out of the superior Courts where the cause of action shall not amount to 10*l.* or upwards (*b*); that where the cause of action shall amount to 10*l.* or upwards, affidavit shall be made and filed of such cause of action, and the sum or sums specified in such affidavit shall be indorsed on the back of such writ or process. There can be no indorsement, therefore, except of the sum specified in the affidavit. The term "duly indorsed," here implies a compliance with the statute; nor can the averment be supported without proof of a bailable cause of action. It was held in *Gunter* v. *Cleyton* (*c*) that in an action against a sheriff for an escape, the plaintiff must shew a good cause against the original defendant. The same point was decided in *Alexander* v. *Macaulay* (*d*). [*Bayley*, J. That was a case which turned upon the sufficiency of the evidence.] The plaintiff was nonsuited in both these cases for not proving a cause of action against the original defendant. Since the statute the plaintiff must prove a bailable cause of action against the original defendant. [Lord *Tenterden*, C. J. No doubt the plaintiff would be nonsuited unless he proved a bailable cause of action.] The term "duly marked and indorsed for bail," implies that an affidavit had been made and filed. It is not contended that the word "duly" will supply the omission of a distinct and independent fact. In *Williams* v. *Germaine* (*e*), the word "duly" could only refer to a presentment at the place mentioned in the acceptance supra protest, and to a demand of payment from the acceptor, and could not supply the omission of an allegation of a presentment to the drawer,

(*a*) Sect. 1.
(*b*) Sect. 2.
(*c*) 2 Lev. 85.
(*d*) 4 T. R. 611.
(*e*) *Ante*, i. 394; 7 B. & C. 468.

which in that case was considered to be necessary (*a*). In *Everard* v. *Patterson* (*b*), the word "duly" did not necessarily import that the *special* authority given by the submission to arbitration had been pursued. It is merely the conclusion which the party chose to draw. *Gibbs*, C. J. there says, "In *Dudley* v. *Watchorn* the word *duly* had reference to the subsequent words *according to the custom and practice of the said Court*. Here the declaration does not state that the award was made *in pursuance of the said authority* (*b*)." In the case referred to by *Gibbs*, C. J. that of *Dudley* v. *Watchorn* (*c*), Lord *Ellenborough* says "Here the allegation is that no writ of capias ad satisfaciendum was *duly* issued against the principal, which refers to the purpose for which it is proposed to be issued, that of charging the bail, and is equivalent in effect to saying that no ca. sa. was sued out in the manner required by the practice of the Court to charge the bail" (*d*). The word "duly" supplies the omission of a statement of circumstances required by law both in civil proceedings, *Rex* v. *Lyme Regis* (*e*), *Patience* v. *Townley* (*f*), and in those which are substantially, *Rex* v. *M'Carther* (*g*), or formally, *Rex* v. *P. Williams* (*h*), of a criminal nature. It is not necessary in pleading to state facts which are implied in those which are stated. *Wyman's Case* (*i*), *Sheriff of Norwich* v. *Bradshaw* (*k*), *Cadwallader* v. *Bryan* (*l*). The course of practice is for the officer not to issue bailable process without first seeing the affidavit. [*Bayley*, J. We can only take notice of what the duty of the officer is. No argument can be founded upon his practice. Lord *Tenterden*, C. J. The process issues from the same officer, whether it be bailable or serviceable.] It is not meant to be contended

(*a*) But see *ante*, ii. 398 (*a*).
(*b*) 6 Taunt. 645; 2 Marsh. 304.
(*c*) 16 East, 39.
(*d*) Ibid.
(*e*) 1 Dougl. 79.
(*f*) 2 Smith, 223.
(*g*) Peake, N. P. C. 155.
(*h*) *Ante*, iii. 402; 8 B. & C. 681.
(*i*) 8 Co. Rep. 81, b.
(*k*) Cro. Eliz. 53.
(*l*) Cro. Car. 162. And see Plow. 105 a, 149 b: Co. Litt. 303 b; 3 Tho. Co. Litt. 406: 2 Wms. Saund. 305 n, 13.

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that this statute is merely directory; though it appears to have been at one time so considered. *Whiskard* v. *Wilder* (*a*). In *Hill* v. *Heale* (*b*) the indorsement on the writ is treated as a sufficient authority to the sheriff. *Webb v. Herne* (*c*), *Cashman* v. *Reid* (*d*), 1 Wms. Saund. 296.

Wyburn, in reply. It is of great importance that it should not be held that a party may be arrested without an affidavit filed. [*Bayley*, J. The point presented to the Court is, whether under such an allegation as that contained in the present declaration the plaintiff is bound to prove at the trial an affidavit for 25*l.* and upwards. Lord *Tenterden*, C. J. It must appear by the declaration in some way or other that an affidavit was filed.] The second point of plaintiff in error is, that this is not sufficiently shewn. It is not enough to allege a compliance with one part of the statute only. The precedents of Mr. Baron *Wood* always state that an affidavit was made and filed. [*Bayley*, J. I have seen precedents in which the allegation is, that the writ was duly indorsed. *Littledale*, J. I have seen many precedents so framed.] The declaration does not specifically charge the existence of a debt above 10*l.* [Lord *Tenterden*, C. J. The question is as to the effect of the averment; as to what proof is required under it.] In *Brazier* v. *Jones* (*e*), it was held that you cannot substitute imprisonment under one authority for an imprisonment under another. In *Thornton* v. *Adams* (*f*), where the defendant justified entering a warehouse for the purpose of taking goods which had been fraudulently and clandestinely carried off the defendant's premises by his tenant, Lord *Ellenborough* says, "I cannot say that the terms *fraudulently and clandestinely*, supply by necessary intendment the allegation that these goods were the goods of the tenant."

Cur. adv. vult.

(*a*) 1 Burr. 330.
(*b*) 2 N. R. 202; *suprà*, 169.
(*c*) 1 Bos. & Pull. 28.
(*d*) 2 B. Moore, 60.
(*e*) *Ante*, ii. 88; 8 B. & C. 124.
(*f*) 5 M. & S. 38.

BAYLEY, J. now delivered the judgment of the Court. After stating the pleadings, his lordship thus proceeded: The form of declaration which has been adopted in the present case has prevailed extensively for more than 20 years without objection. The form is a convenient one, and we are of opinion that it may by law be supported. The declaration states that *Kirke* was indebted to *Wilcockson* in a large sum of money, to wit, 50*l*. This, where a sum or time, &c. is material, will be taken to be an allegation of the time, sum, &c. though laid under a videlicet. Upon demurrer, therefore, this declaration must be considered to contain a precise allegation that 50*l*. was due. The safer mode of pleading would have been to allege *Kirke* was indebted to *Wilcockson* in a sum exceeding 10*l*., to wit, 50*l*. The declaration then proceeds to state, that for the recovery of this debt they issued a capias ad respondendum with an ac etiam against *Kirke*; that this writ was duly indorsed for bail for 25*l*.; that, being so marked and indorsed, it was delivered to the sheriff to be executed. We think that this is sufficient, and that the writ, which is stated to have been prosecuted out of this Court, is to be presumed not to have been awarded improvidently. The presumption is, that all things have been done rightly, and that all steps have been taken which are necessary by statute or by the practice of the Court to the due issuing of the writ (*a*). The statute does not apply to all cases. It has been held to restrain plaintiffs only, and not to affect the power of the Court on the special application of the plaintiff. Before the statute the present form of declaration would have been free from objection; and as since the statute the affidavit is not required in all cases, it does not appear on the face of the record that this is a case to which the statute applies. We are, therefore, of opinion that the declaration alleges all that is necessary.

Judgment affirmed.

(*a*) The objections of the plaintiff in error appear to have been directed, not to the issuing of the process, which remains as at common law, but to the sufficiency of the statement of the process, after it had issued, having been dealt with as required by the statute.

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The KING v. The Inhabitants of BELFORD.

A burgess receiving, by the allotment of the burgesses, a portion of the rent of lands held by the borough, does not gain a settlement by estate.

UPON an appeal against an order of two justices, whereby *Grace*, the wife of *John M'Queen*, then a prisoner in the gaol of Berwick, and their children, were removed from Berwick-upon-Tweed to Belford, in the county of Northumberland, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper, *J. M.*, being a burgess of Berwick-upon-Tweed, and being then settled in Belford, came in 1807 to reside at Berwick-upon-Tweed, where he continued up to the date of the above order, at which time he was a prisoner in Berwick gaol, and his wife and five children became chargeable to the parish of Berwick-upon-Tweed. For the last three years of his residence in the parish of Berwick-upon-Tweed the pauper enjoyed, as such burgess, certain pecuniary benefits arising out of the estates of the corporation lying in the same parish, in the manner after mentioned. The mayor, bailiffs, and burgesses of the borough of Berwick, by virtue of a charter granted 1 *Jac.* 1, and confirmed by act of parliament, hold, to the use of them and their successors, a large estate in land, situate in the parish of Berwick-upon-Tweed, which parish is co-extensive with the borough. This estate is chargeable in the first instance with the payment of salaries of officers and other corporation expenses imposed by the charter, but has from an early period after the grant of the charter, and from thence hitherto, been distributed into three portions, and each portion applied to distinct purposes. The first portion consists of several farms, which are demised to tenants by the mayor, bailiffs, and burgesses, the rent being reserved to the mayor, bailiffs, and burgesses, or to their treasurer for the time being, and collected by him. This rent, together with the proceeds of other property, called the Town's Ancient Revenue, now form a separate fund, out of which the salaries of the officers and other corporate expenses authorized by the charter are defrayed. These farms are

called "Treasurer's Farms." The second portion is subdivided into several parcels, varying in quantities from an acre and a half to two acres and a half, and in value from 2*l.* to 9*l.* per annum. These are called Meadows; and at an annual meeting of the burgesses called "a Meadow Guild," are distributed, as they become vacant by the death or non-residence of the last occupiers, among the senior resident burgesses and widows of burgesses who succeed to the rights of their husbands as to meadows and stints, though the charter has no provision in behalf of the widows, the eldest resident burgess being entitled to choose the most valuable vacant meadow, and so in succession down to the junior, till the number of vacant meadows is exhausted. The burgesses may either occupy those meadows themselves or let them to tenants, reserving the rents to themselves. The lands forming the third portion were, up to the year 1761, open fields, upon which each burgess was entitled to a certain right of depasturing; but at that period they were inclosed, and have ever since been let in guild, as farms, to tenants for various terms of years, and are now demised by lease under the corporation seal, and the rent has been, since the year 1810, uniformly reserved to the mayor, bailiffs, and burgesses, (which is the name of incorporation,) their successors or assigns, or to their treasurer for the time being. Previously to that period, however, several instances occur of leases of stint land, wherein the reservation of the rent was made "to the mayor, bailiffs, and burgesses, their successors or assigns, or to their treasurer for the time being, or to the several respective burgesses or burgesses' widows who should from time to time during the said term have shares in the said farm hold in equal portions." The rent of each farm is divided into a certain number of equal portions, generally eleven, but in a few instances twenty-two. At another annual meeting, called "a Stint Guild," a portion is allotted upon a specific farm to each resident burgess or burgess's widow, or to as many of these as there are vacant portions. These

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portions are called "Stints," and they, like the meadows, vary in value from 2*l.* to 9*l.* per annum, the senior burgesses being in like manner entitled to a preference as the more valuable stints become vacant, the younger burgesses succeeding as vacancies, by the death, removal, or promotion of their seniors, occur. The portions of the rents called stints are paid annually by the treasurer of the corporation to the burgesses who are entitled to them; but, until the last fourteen or sixteen years, the burgesses in many instances received their stint money immediately from the farmers or lessees of the specific farms upon which their several stints were assigned. The burgesses in guild have, by their charter, a power of making bye-laws for the good rule and government of the corporation, and for the better preserving, governing, disposing, letting, and demising of their lands, &c. In the exercise of this right the burgesses assembled in guilds make bye-laws to regulate the enjoyment of the meadows and stints, and have prescribed the conditions of husbandry under which meadow and stint lands may be broken up and converted into tillage, and (in the case of the meadows) the terms for which they may be let by the individual burgesses to whom they are allotted. They also decide upon the title of those who claim to enjoy meadows and stints according to such bye-laws; and instances occur upon the records, of forfeitures, both of meadows and stints, either absolute or for limited periods, inflicted by the burgesses in guild for infraction of bye-laws or other gross misconduct. But unless there be such forfeiture, or the party either become non-resident or relinquish his stint or meadow by choosing one of more value, he may remain in the enjoyment of the stint or meadow which has at the first been allotted to him for the term of his life. Some burgesses are permitted to enjoy one stint only, others two stints, and others again one meadow and one stint. Those who enjoy two stints are said to hold one of the stints for or in lieu of a meadow. The pauper was for the three years next preceding this

order of removal, and still is, in the enjoyment of one stint assigned within the parish and borough of Berwick-upon-Tweed, called the Burrs, and annually receives from the treasurer of the corporation, for his portion of the rent, the sum of 3*l.* 5*s.* 9*d.* He is also in the enjoyment of another portion assigned upon another farm, called No. 12 of the outfields, under the description of "stint for a meadow;" his share of the rent of the last named farm being 3*l.* 1*s.* 9*d.* The rents of these two farms are now and during all the time of the pauper's sharing in them have been reserved to the mayor, bailiffs and burgesses, or to their treasurer, and these rents are received by the treasurer, and the above are paid to the pauper by him. The pauper is not at present entitled to a meadow, but he will be entitled (if he so long live) to claim one as soon as a vacancy occurs in regular rotation. The pauper, in his character of a burgess of the borough of Berwick-upon-Tweed, is a member of the assemblies of burgesses, called guilds, held under the provisions of the charter or otherwise, and, therefore, entitled to a vote as well in the meadow and stint as in other guilds.

The question for the opinion of this Court is, whether the pauper *John M'Queen* was, during his residence under the above circumstances in the parish of *Berwick-upon-Tweed*, irremovable therefrom so as to acquire a settlement in the said parish.

Ingham, in support of the order of sessions. No land in the parish was held by the pauper, or in trust for him. *Rex* v. *Stone* (*a*). An indirect interest in the land is not sufficient; as an annuity charged upon the land, *Rex* v. *Stockley Pomroy* (*b*), a right of dower before assignment, *Rex* v. *Northweald Bassett* (*c*), a distributive share before administration granted, *Rex* v. *Widworthy* (*d*), *Rex* v. *North*

(*a*) 6 T. R. 295.
(*b*) Burr. S. C. 762.
(*c*) 4 D. & R. 276; 2 B. & C. 724.
(*d*) Burr. S. C. 109.

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Curry (*a*), *Rex* v. *Berkswell* (*b*), a licence to occupy, *Rex* v. *Horndon on the Hill* (*c*), or a doubtful equity, *Rex* v. *Toddington* (*d*). Here the burgesses have at the most only a right to call upon the treasurer to account to them for the rents allotted to them respectively. If the corporation were dissolved, the lands would revert to the heirs of the donors without regard to the individual members. 8 *Vin. Abr.* (*e*). He was stopped by the Court.

Alderson, contrà. The pauper was irremovable, *Rex* v. *Warkworth* (*f*), and therefore gained a settlement. The burgesses have the power of determining in what manner the land shall be occupied. The receipt of rent is equivalent to actual enjoyment of the land. The pauper is entitled to be present at the guild at which the lands are let. His removal would deprive him of that privilege, and of his undivided share of the rent. He is, therefore, irremovable. [*Bayley*, J. He has a right to vote whether entitled to a stint or not.] A mere claim is sufficient. *Rex* v. *Staplegrove* (*g*). [*Bayley*, J. That was the case of a reversioner who went to reside on what he believed to be entirely his own estate; and he could not have been removed until the parish officers had found the deed creating the term.] The pauper had not then the right which he claimed, though the parish officers were not prepared to disprove it. The decision of the Court proceeded on the ground that a coming to settle under such circumstances was not within the prohibition of the statute of *Car.* 2.

T. Greenwood, on the same side. By Magna Charta, disseisins are prohibited not only where a person has

(*a*) Caldec. 137.

(*b*) 3 D. & R. 9; 1 B. & C. 542.

(*c*) 4 M. & S. 562.

(*d*) 1 B. & A. 560.

(*e*) 8 Vin. Abr. Corporation, H. 3, pl. 9. Upon the dissolution of monasteries in the reign of *Henry* 8, the reversionary interest of the heirs of the respective donors was destroyed by an act of parliament, which vested the fee simple in the crown.

(*f*) 1 M. & S. 473.

(*g*) 2 B. & A. 527.

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a freehold but where he has a franchise of any kind (*a*). He is, therefore, irremovable from such franchise (*b*). The rule was first narrowed in *Rex* v. *Warkworth*. There, however, the party was merely entitled to a right of common which he had not the means of exercising; here he has a specific rent-charge issuing out of the particular land. [*Bayley*, J. No burgess is seised in his individual capacity.]

Lord TENTERDEN, C. J.—I am of opinion that the pauper is not seised of any estate legal or equitable. The estate is in the corporate body; and it is immaterial whether the corporation allowed the pauper to enjoy the whole or a certain portion of the rents, or assigned to him the rent of a particular estate. The pauper had no right to enter upon the land or to make over his interest to another. He was entitled even to the rent only so long as the corporation pleased.

BAYLEY, J.—*Rex* v. *Warkworth* shews that the possession of a right of common is insufficient. Here, the pauper had no estate either legal or equitable. The rent is dealt out under the bye-law as the burgesses think proper.

LITTLEDALE, J.—The pauper had no right to occupy the land.

PARKE, J.—The pension was determinable at the pleasure of the corporation.

Order of sessions confirmed.

(*a*) Cap. 29. Nullus liber homo —— disseisiatur de libero tenemento vel *libertatibus* vel liberis consuetudinibus suis—— nisi per legale judicium parium suorum vel per legem terræ.

(*b*) And see *Rex* v. *Aythrop Rooding*, Burr. *S. C.* 414.

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SHAW *v.* PRITCHARD, Clerk, and others.

A demise of the glebe by incumbent of a benefice with cure of souls, to secure an annuity, is void by 57 *Geo.* 3, c. 99, reviving 13 *Eliz.* c. 20.

THE following case was sent by Lord *Eldon*, C. for the opinion of this Court.

By indenture, bearing date the 8th of September, 1826, and made between the Reverend *William Pritchard*, clerk, being then and still rector of the rectory and parish church of Yeldham, in the county of Essex, and also vicar of the vicarage of Great Wakering, in the same county, of the first part: *Benjamin Shaw*, of Kilburn Priory, in the county of Middlesex, Esq. of the second part: and *William Stephens*, of Bedford Row, in the county of Middlesex, gentleman, of the third part: and duly executed by the said *William Pritchard*, after reciting that the said *William Pritchard* was rector of the said rectory and parish church of Great Yeldham, and in right thereof was seised or entitled of or to the glebe lands, together with all and singular the great, or predial, and small tithes, tenths, moduses, or customary payments in lieu of such tithes or tenths, rents, offerings, and oblations, and other appurtenances to the same rectory or parsonage belonging or appertaining; and also reciting that the said *William Pritchard* was also vicar of the said vicarage of Great Wakering, and in right thereof was seised or entitled of or to the vicarial tithes to the said vicarage belonging; and also reciting that the said *William Pritchard*, together with *John Daniel Haslewood*, clerk, rector of the rectory and parish church of Boughton Winchelsea, in the county of Kent, had contracted to sell to the said *Benjamin Shaw* one annuity or clear yearly sum of 93*l.* 10*s.* to be paid to the said *Benjamin Shaw*, his executors, administrators, or assigns, during the natural life of the said *William Pritchard*, at or for the price of 750*l.*: And that in pursuance and part performance of the said agreement on the part of the said *William Pritchard* and *John Daniel Haslewood*, they the said *William Pritchard* and *John Daniel Haslewood* had, by a certain bond, bearing even date with the said

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indenture, become bound unto the said *Benjamin Shaw*, his executors, administrators, and assigns, in the penal sum of 1500*l.*, with a condition thereunder written for making the same void on payment by the said *William Pritchard* and *John Daniel Haslewood*, or one of them, or one of their executors, or administrators unto the said *Benjamin Shaw*, his executors, administrators, or assigns, yearly and every year, during the natural life of the said *William Pritchard*, the said annuity of 93*l.* 10*s.* by four equal quarterly payments on the 8th of June and the 8th of September in each and every year, (the first quarterly payment to be made on the 8th day of December the next ensuing,) together with a proportionable part of the said annuity up to the day of the death of the said *William Pritchard*, in case he should happen to die on any other day than one of the said quarterly days of payment. It was by the said indenture witnessed, that in pursuance and performance of the said agreement on the part of the said *William Pritchard*, and in consideration of the said sum of 1500*l.* then paid by the said *Benjamin Shaw* to the said *William Pritchard*, and for the nominal consideration therein mentioned to have been paid by the said *William Stephens* to the said *William Pritchard*, he the said *William Pritchard* did, at the request of the said *Benjamin Shaw*, grant, bargain, sell and demise unto the said *William Stephens*, his executors, administrators and assigns, all that and those the said rectory and parish church of Great Yeldham, and the said vicarage of Great Wakering, in the said county of Essex; and all the messuages or tenements and glebe lands, tithes, tenths, oblations, obventions, offerings, portions, profits, emoluments, rights, members and appurtenants whatsoever, situate and being within or forming part or parcel of, or issuing from, the same rectory and vicarage respectively, or thereunto or unto any part thereof respectively belonging or in anywise appertaining; To have and to hold the said rectory and vicarage, messuages or tenements, glebe lands, tithes, hereditaments, and all and singular other the

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premises thereby granted, bargained, sold and demised, or expressed or intended so to be, with their rights, members, and appurtenances, unto the said *William Stephens*, his executors, administrators, and assigns, thenceforth for and during the full end and term of ninety-nine years thence next ensuing, if he the said *William Pritchard* should so long live: Yielding and paying therefore yearly and every year during the said term, unto the said *William Pritchard* or his assigns, the rent of a pepper corn, if lawfully demanded: Upon trust to permit the said *William Pritchard* or his assigns to hold and enjoy the said rectory and vicarage, and lands and premises, and to receive the rents, issues, and profits thereof respectively, for his and their proper use and benefit, until the said annuity, or some quarterly payment thereof, should be in arrear by the space of twenty-one days next after the same should become payable as therein mentioned: And upon further trust, that in case default should at any time thereafter be made in payment of the said annuity, or any part thereof, by the space of twenty-one days next after the same should become payable as aforesaid, the said *William Stephens*, his executors, administrators, or assigns, should enter into the actual possesion of all and singular the said rectory and vicarage, hereditaments and premises, and should, so long as the said annuity should be payable, continue in such possession, and receive all the tithes or compositions or payments for or in lieu of tithes, and all other the rents, issues, and profits of or belonging to the same rectory and vicarage, hereditaments and premises respectively, and should from time to time set, let, order, or manage the same rectory or vicarage, hereditaments and premises, in such manner as to him should seem reasonable: And upon trust, out of the residue of the said moneys to pay the said *Benjamin Shaw*, his executors, administrators, or assigns, the said annuity, or so much thereof as should not have been otherwise satisfied, and to pay the ultimate residue or surplus of the said moneys unto the said *William Pritch-*

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ard, clerk, his executors, administrators, or assigns: And it was also thereby declared, that if the said annuity, or any part thereof, should at any time be in arrear by the space of forty days next after any of the days on which the same ought to have been paid as aforesaid, it should be lawful for the said *William Stephens*, his executors, administrators, or assigns, and he was thereby directed, if requested so to do by the said *Benjamin Shaw*, his executors, administrators, or assigns, by demising, leasing, mortgaging, or selling the said rectory and vicarage, hereditaments and premises, or any part thereof, for all or any part of the said term of ninety-nine years, or by such other ways and means as to him or them should seem meet, to levy and raise such sum and sums of money as would be sufficient or as he or they should think fit or expedient to raise, for paying and satisfying the said *Benjamin Shaw*, his executors, administrators, or assigns, the said annuity, or such part thereof as should be in arrear, and all costs, charges, and expenses which the said *Benjamin Shaw*, his executors, administrators, or assigns, or the said *William Stephens*, his executors, administrators, or assigns, should sustain by reason of the non-payment of the said annuity, on the days aforesaid, or otherwise in the execution of the trusts of the said indenture: And the said *William Pritchard* did thereby, for himself, his heirs, executors, and administrators, covenant with the aforesaid *Benjamin Shaw*, his executors, administrators, and assigns, that in case the said annuity, or any quarterly payment thereof, should happen to be behind or unpaid by the space of forty-five days next over or after any of the said days and times on which the same were then appointed to be paid as aforesaid, and the said *Benjamin Shaw*, his executors, administrators, or assigns, should deem it expedient to sequester the said rectory and vicarage, or either of them, it should be lawful for the said *Benjamin Shaw*, his executors, administrators, or assigns, and the said *William Pritchard* did thereby authorize and empower him and them to sequester the said rectory and vicarage, or either of them, for payment of the arrears of the said

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annuity, or any part thereof, and particularly to instruct counsel or civilians to act for the said *Benjamin Shaw*, his executors, administrators and assigns, and for the said *William Pritchard*, and in his name, either in Courts of common law, civil law, or equity, or elsewhere, as occasion should require, to assent to and concur in all such proceedings as might be necessary to obtain an immediate sequestration of the said rectory and vicarage, or either of them, and that without giving notice to or advising or consulting with the said *William Pritchard* thereupon.

The question for the opinion of the Court is,—whether the above demise for securing an annuity, being subsequent to the act of parliament passed in the 57th year of the reign of his late majesty *Geo.* 3, intituled, "An Act to consolidate and amend the laws relating to spiritual persons holding of farms, and for enforcing the residence of spiritual persons on their benefices, and for the support and maintenance of stipendiary curates in England," is valid or not.

Manning, for the plaintiff, and for the defendant *Stephens*. It was the intention of the 57th *Geo.* 3 to repeal the whole of the statute of *Eliz.*, which relates entirely to leases. The 57th *Geo.* 3, after enumerating twelve statutes, four of which had been passed in the reign of *Elizabeth*, enacts, "that so much of the said several recited acts passed in the reign of his majesty King *Henry* the 8th, and so much of the said acts in the reign of her majesty Queen *Elizabeth*, of the said recited acts of his majesty King *Charles* 1, as relates to spiritual persons holding of farms, and to leases of benefices and livings, and to buying and selling, and to residence of spiritual persons on their benefices, and also so much of the said recited acts of her majesty Queen *Anne*, and of the said recited act of the 36th year of the reign of his present majesty, as relates to the maintenance of curates within the Church of England, and making provision for appointing stipends for such curates, and all the said several recited acts, passed in the

reign of his present majesty, shall be, and the same are respectively hereby repealed." Some of the statutes of *Eliz.* contain clauses wholly unconnected with the objects falling within the purview of 53 *Geo.* 3. This explains the use of the words "so much," but it was clearly not the intention of the legislature to leave standing any part of the 13 *Eliz.* c. 20. The title of that statute describes it as "an act touching leases of benefices and other ecclesiastical benefices with cure." The first section of that statute runs thus: "that the livings appointed for ecclesiastical ministers may not, by corrupt and indirect dealings, be transferred to other uses, be it enacted, &c., that no lease, after the 15th day of May, &c., to be made of any benefice or ecclesiastical promotion with cure, or any part thereof, and not being impropriated, shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice, without absence above fourscore days in any one year, but that every such lease, so soon as it, or any part thereof, shall come to any possession or use above forbidden, or immediately upon such absence, shall cease and be void, and the incumbent so offending shall for the same lose one year's profit, to be distributed by the ordinary among the poor of the parish; and that all chargings of such benefices with cure hereafter with any pension or with any profit out of the same to be yielded or taken hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this act, shall be utterly void." The provision in this act by which the present demise would have been affected is evidently that contained in the former part of the first section, the words of which are sufficient to avoid a lease made for the purpose of transferring a living to other uses than the support of ecclesiastical ministers; and though the words "charging of such benefices," in the latter part of the section, might have affected such a lease as the present, if the statute had contained no clause directly applying to leases, it is too

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much to say that leases which had been already expressly provided for were meant to be attacked again under the general description of chargings. At common law this lease would have been undoubtedly good; and while the statute of 13 *Eliz.* c. 20, was in full operation, and before the enabling statute of 33 *Geo.* 3, c. 84, demises in this form were common. *Errington* v. *Howard* (*a*), *Doe* d. *Rogers* v. *Mears* (*b*), *Mouys* v. *Leake* (*c*), *Bromley* v. *Holland* (*d*), *Bowyer* v. *Pritchard* (*e*), *White* v. *Bishop of Peterborough* (*f*), *Silver* v. *Bishop of Norwich* (*g*), *Co. Litt.* 45, a. In *Doe* d. *Cates* v. *Somerville* (*h*), and in *Doe* d. *Broughton* v. *Gully* (*i*), the leases being granted after the repealing statute of 43 *Geo.* 3, c. 84, and before 57 *Geo.* 3, c. 99, were clearly good; and though in those cases the circumstance of the demises having been made before 57 *Geo.* 3, c. 99, was mentioned by the Court, it was not in either of them necessary to consider whether the repeal of 13 *Eliz.* c. 20, would have been less complete under 57 *Geo.* 3, c. 99, than it was under 43 *Geo.* 3, c. 84. The reference by the learned judges, therefore, to 57 *Geo.* 3, c. 99, amounts to no more than this, that the leases then before the Court having been granted during the continuance of 43 *Geo.* 3, c. 84, which undoubtedly repealed the statute of *Eliz.*, they would be valid, even assuming that the prohibitory clauses of the statute of *Eliz.* were restored by 57 *Geo.* 3, c. 99.

Supposing the second branch of the first section of 13 *Eliz.* c. 20, to apply to leases, notwithstanding they have been already provided for by the former branch of the section, then the second branch would also come within the repealing clause of 57 *Geo.* 3, c. 99, in which the term "leases" is not confined to leases described *eo nomine* in

(*a*) Ambler, 485.
(*b*) Cowp. 129.
(*c*) 8 T. R. 411.
(*d*) 5 Ves. 610; 7 Ves. 3.
(*e*) 11 Price, 103.
(*f*) 3 Swanst. 109.
(*g*) Ibid. 112, n.
(*h*) 6 B. & C. 126.
(*i*) *Ante*, iv. 249; 9 B. & C. 344.

the repealed statutes. The 14 *Eliz.* c. 11, is one of the statutes partially repealed, and yet that statute contains no provision upon which the repealing clause as to leases can operate, except a clause for avoiding bonds, contracts, promises, and covenants for permitting parties to enjoy a benefice, or take the profits thereof. The repealing clause of 57 *Geo.* 3, c. 95, would therefore have no operation upon 14 *Eliz.* c. 11, unless the leases there spoken of embraced all contracts for divesting the incumbent of the possession of the profits of the living, whatever shape they might be made to assume.

Chitty, *Patteson*, and *Follett*, appeared for several defendants, who, being also incumbrancers on the living, were interested in upholding the demise, and shortly supported the arguments which had been adduced for the plaintiff.

Broidrick, for the defendant *Osborne*, contrà. In passing 13 *Eliz.* c. 20, the intention of the legislature was to protect the successor. The object was also to protect the incumbent himself, first against leases, then against other chargings. Leases are avoided by non-residence, or by being so dealt with as to make them operate as charges; but direct charges, whether in the form of leases or in any other form, provided they are not intended to enure as bonâ fide leases, are absolutely void. This wholesome provision had been inadvertently repealed by 43 *Geo.* 3, c. 84. The effect of the 57 *Geo.* 3, c. 99, is to restore the prohibition as to charges, but to continue the repeal of the former part of the 1st section of 13 *Eliz.* c. 20, under which it had been held, that an incumbent, by his own wrongful act in absenting himself from his benefice, might avoid his own bonâ fide lease. The demise in this case is clearly in substance not a lease, but a charge. In *Doe* v. *Somerville* and *Doe* v. *Gully* it was not doubted but that if the charges in the form of demises then before the Court, and which

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are precisely in the same form as the present, had been created since the passing of 57 *Geo.* 3, c. 99, they would have been void.

The following certificate was afterwards sent:—

"This case has been argued before us by counsel, and we are of opinion that the demise for securing the annuity in question is invalid, being in substance a charging of the benefice within the meaning of the 13 *Eliz.* c. 20, which, as far as relates to chargings of benefices, is now in force.

J. BAYLEY,
J. LITTLEDALE,
JAS. PARKE."

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A. agrees to execute to *B.* an effectual assignment of the two leases of a house and shop for 425*l.* "as he holds the same for term of 28 years," and *B.* agrees to accept "a proper assignment of the leases as above described, without requiring the lessor's title:"—Held, that *B.* was bound to take an assignment of two consecutive leases, though the second was void, being executed under a power which had not been pursued.

ASSUMPSIT. The declaration contained special counts for non-performance of the agreement mentioned below, for the sale of a public-house, &c., alleging defect of title, the non-payment of a penalty of 500*l.*, and of the expenses of endeavouring to obtain an assignment, and the non-return of a deposit of 200*l.* paid by the plaintiff under the agreement, with the usual money counts. Plea, non-assumpsit. At the trial before Lord *Tenterden*, C. J. at the sittings at Westminster after Michaelmas term, 1828 (*a*), a verdict was found for the plaintiff, damages 230*l.* (*b*), subject to the opinion of this Court upon the following case.

On the 23d of April, 1828, the plaintiff and defendant entered into the following agreement (*c*):—

"Memorandum of an agreement made this *twenty-third* day of *April*, 1828, whereby it is witnessed, that *William Jeffery, of &c.* victualler, doth agree to sell unto William

(*a*) Counsel for the plaintiff, Sir *J. Scarlett* and *Jardine*; for the defendant, *Campbell* and

(*b*) The amount of deposit and expenses of investigating the title and the broker's charges.

(*c*) The words in italics are written, the rest printed.

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Spratt, of Shadwell, *the two leases and good-will in trade* of the house and premises now occupied by *him*, known by the sign of *The Rockingham Arms, and shop adjoining*, situate *at &c.*, for the sum of 425*l.* as *he* now holds the same, *for terms of* 28 *years from Midsummer next ensuing, at the annual rent of* 126*l. and under fair and usual covenants, only except that the lessee is to insure and to keep the house as a tavern or coffee-house, to be called The Rockingham Arms;* also such of *his* household goods, fixtures and effects now on the premises as *he* has a right to sell, at a fair valuation, by &c.; also his saleable stock in trade, not exceeding the undermentioned quantities and value, viz. porter, *nine* butts, &c.; such stock to be valued by proper persons or their umpire: And the said *William Spratt* doth hereby agree to *accept a proper assignment of* the said *leases* and premises *as above described, without requiring the lessor's title;* and that *he* will pay unto the said *William Jeffery* the said sum of 425*l.* for *the same;* also the amount at which the goods, fixtures, effects, and stock in trade shall be valued as aforesaid, together with the proportionate value of the unexpired term in the licences (after deducting the sum of *two hundred pounds*, which has now been paid as a deposit,) and take possession of the said house and premises on or before *the 5th day of May next ensuing*, at which time, upon payment of the several sums as aforesaid, *he* the said *William Jeffery* doth agree *to execute an effectual assignment of the said leases, and* deliver up possession of all the said premises *except the shop, which is underlet at will*, and also the effects and stock in trade, and to assign over good and sufficient licences to the said *William Spratt;* also to repair or allow for the external damaged windows, and pay and allow for all rent, taxes, gas, and outgoings, up to the day of quitting possession. And it is mutually agreed, that all reasonable expenses of carrying this agreement into effect shall be paid in equal moieties, and that if either of the said parties shall not fulfil all and every part of the same, the party not fulfilling shall pay unto the other

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of them who shall be ready and willing to fulfil the same the sum of *five hundred* pounds hereby settled and fixed as liquidated damages, the deposit now paid to be forfeited in part of such damages, or returned in addition thereto as the case may be."

Then followed an engagement by *Jeffery* not to be concerned in any victualling-house within half a mile (*a*).

Shortly after the above agreement was executed, the plaintiff's attorneys received from the defendant's attorneys an abstract of the vendor's title to the premises in question, entitled "Abstract of the title of Mr. *W. Jeffery* to leasehold premises, called the Rockingham Arms, in the parish of St. Mary, Newington, in the county of Surrey." The abstract (to which either party may refer) set forth an indenture dated the 2d of March, 1813, made between *John Carter* and *Samuel Brandon* (therein described as the then trustees of the will of *Thomas Brandon*, deceased) of the first part, *Stephen Hall*, on behalf of himself and his infant children, *William Smith* and *Mary Ann* his wife, *Thomas Fleming* and *Harriet* his wife (which said *Mary Ann Smith* and *Harriet Fleming* were stated in such lease to be the only then surviving children of the said *Thomas Brandon*, deceased, and to be with the infant children of the said *Stephen Hall*, by his late wife *Elizabeth Hall*, deceased, another of the daughters of the said *Thomas Brandon* deceased, the only devisees and legatees named in his last will and testament) of the second part; and *Joseph Denyer* of the third part. By this lease, *John Carter* and *Samuel Brandon*, with the consent and approbation of the parties thereto of the second part, demised the premises in question to *Denyer* for 25 years from the 24th June, 1812, at the yearly rent of 126*l*. After stating several mesne assignments the abstract shewed, that by an assignment dated 2d June, 1824, the lease and premises became vested in *Alexander Magnus* for the residue of the term. The abstract then set forth an indenture of lease dated the 17th of June, 1825, between *John Webster*, therein described as

(*a*) As to mode of computing distance, vide *Leigh* v. *Hunt*, ante, iv. 579.

the then only continuing trustee of the estates of the said *Thomas Brandon*, deceased, of the first part, *Stephen Hall*, *Thomas Fleming*, *George Webster* and *Elizabeth* his wife, late *Elizabeth Hall*, spinster, *Mary Ann Hall* and *Jane Hall*, of the same place, spinsters, *Stephen Hall*, *Thomas Brandon Fleming* and *Harriet Fleming*, therein described as parties beneficially entitled to the estates of the said *Thomas Brandon*, of the second part, and the said *Alexander Magnus* of the third part. By this indenture it was witnessed, that in consideration of 1000*l.* paid by *Magnus* to the parties thereto of the second part, the said *John Webster*, by the consent and direction of the parties thereto of the second part, demised the premises in question to *Magnus*, his executors, administrators and assigns, for 19 years from the 24th June, 1827, at the yearly rent of 126*l.* The abstract then stated a bond also dated the 17th June, 1825, from the parties of the second part to the last mentioned indenture of lease to *Magnus*, his executors, administrators and assigns, in the penal sum of 2000*l.* for quiet enjoyment of the premises against *John Webster*, his executors, administrators and assigns, themselves, and any claimants under them or the said *Thomas Brandon*, deceased. The abstract, after divers mesne assignments, then shewed an assignment by indenture, dated 10th June, 1826, of both the above leases to the defendant, the consideration for which assignment was 4000*l.* After perusing the abstract, the plaintiff's attorneys returned it to the defendant's attorneys with several queries on the title, written in the margin, and amongst them were inquiries whether the trustees under the will of *Thomas Brandon*, named as the granting parties in the two indentures of lease of the 2d March, 1813, and 17th June, 1825, had power to grant leases upon a premium, and whether the respective directing parties to those leases were all the parties beneficially interested in the demised premises.

On the 5th May, the vendor's attorneys returned the abstract, and in answer to these inquiries referred generally

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to the will of *Thomas Brandon*, and at the same time required the plaintiff's attorneys to forward the draft assignment as soon as possible. Upon examining the will it appeared that *Thomas Brandon* devised the premises in question, with other property, to trustees, amongst whom was *John Carter*, one of the granting parties in the lease of 2d March, 1813, in trust for his, the testator's, three daughters, *Mary Ann Brandon*, *Elizabeth Brandon*, and *Harriet Brandon*, in equal shares as tenants in common, and not as joint tenants, and for their respective executors, administrators and assigns, subject to a proviso that it should be lawful for the said trustees, or the survivors or survivor of them, to demise the estate devised to them in trust on building or repairing leases, or common tenants leases, for any term of years, so as all such leases made in pursuance of that his will should be made to take effect in possession, and not in reversion, or by way of future interest; and so as upon every such lease or demise there should be reserved, during the continuance thereof, the best and most improved rent that could be reasonably had or gotten for the same, without taking any sum or sums of money by way of fine or foregift. At the time when the indenture of lease dated 17th June, 1825, was granted, several children of *Elizabeth Brandon* and *Harriet Brandon*, mentioned in the will of *Thomas Brandon*, beneficially interested in the premises under the will, were living, and infants, and did not join in the lease; and some of such children were living and infants at the time when the above agreement was made between the plaintiff and the defendant, and also at the time when the cause was tried.

On the 5th May, the day appointed by the contract for the completion of the purchase, the defendant was prepared to give possession of the premises, and to assign the leases; and plaintiff attended on the premises with his broker, but his attorneys did not attend, and on the following day by letter to defendant's attorneys, plaintiff's attorneys stated, that before they proceeded any further in the

business, or gave any answer to the question put to them by the defendant's solicitor that morning, requiring to be informed whether they meant to complete the purchase or not, wished to be informed whether the answers returned to the plaintiff's solicitor's queries on the abstract contained all the information intended to be furnished, and whether the deeds which they, the plaintiff's attorneys, required would be produced to them. To which letter the defendant's attorneys returned for answer that they did not feel themselves bound to give any further answers to the queries on the abstract; that the deeds required to be produced were not in their possession, and that the same related to the lessor's title, which the purchaser was not at liberty to inquire into. On the 12th May, the plaintiff's attorneys by letter informed the vendor's attorney that they had inspected the will of the late *Thomas Brandon* at Doctors' Commons, that it appeared that the will gave a power to the trustees to grant leases, so that no premium were taken for the granting thereof, and that the term were made to commence in possession, and not in reversion. They further stated that the title to the second lease appeared on the face of the abstract (connected with the information acquired by the inspection of the power under which it was granted) to be decidedly defective, a premium having been taken for the granting thereof, and the term being made to commence in reversion and not in possession. Under these circumstances they informed the vendor's attorneys that it was the intention of their client to rescind the contract, and to require the payment of the deposit money with interest and the expenses, together with 500*l.* agreed to be paid as liquidated damages. With this requisition the defendants refused to comply.

All the parties interested, who were of age when the second lease was granted, joined therein and received the consideration money, and laid out the whole of it in beneficially improving other parts of the property devised by the will, of which devised property the premises in ques-

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tion are part, for which purpose money was wanted. The defendant, at the time of making the contract, declared to plaintiff and his broker, that he, defendant, would sell no other title than what he held, and would not sign the agreement unless the stipulation respecting the non-production of the lessor's title were introduced. The rent of 126*l.* per annum was not at the time of the trial of the cause the best and most improved rent that could reasonably be had or gotten for the premises.

Jardine, for the plaintiff. This was an entire agreement for the sale of two leases. On the first lease no question arises; but the lease of 1825 was, in equity, absolutely void, being made in contravention of the power in three particulars; 1st. it does not reserve the best rent; 2dly, it is granted in reversion; and 3dly, a sum of money is taken by way of fine. This is not a formal defect in the execution of a power, in which case equity may relieve; but the lease is granted in direct contravention of the terms of the power, and is, therefore, absolutely void (*a*), and cannot be confirmed (*b*). Upon the face of the abstract also the title is defective. It is not shewn that Dr. *Webster* had any interest at all; he is not named as a trustee in the will, nor does his authority to demise any where appear. The defendant asked for the deeds by which Dr. *Webster* was appointed trustee, but they were not furnished, and he had therefore no reasonable satisfaction that Dr. *Webster* had any title whatever. The whole question is, whether the plaintiff has contracted by the terms of his agreement to accept such title as the vendor had, whether good or bad. There are only two parts of the agreement upon which the defendant can rely as compelling the plaintiff to take the title whether good or bad. The Court must be satisfied

(*a*) *Campbell* v. *Leach*, Ambler, 740; Sugd. Powers, 377.

(*b*) Co. Litt. 295. And see *Jones* v. *Verney*, Willes, 169; *Doe* v. *Watts*, 7 T. R. 83.

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that the purchaser explicitly contracted for such title as the vendor could give, or that he had notice of the badness of the title before they will enforce payment of the 5000*l*. Of the latter circumstance there is no evidence in the case. It will, however, be contended for the defendant, from two passages in the agreement, that the purchaser is bound to take such title as the vendor could give. The first of these is the words "as he holds the same." By the context it will clearly appear, that these words were not intended to be used in the sense which it is now attempted to affix to them. They were merely used as descriptive of the manner and circumstances of the occupation. They relate to the possession, and not to the title. The expression relied on is found in that part of the agreement which points out those things which are to be done by the vendor. In the purchaser's part there are words of more limited extent, which would have been useless if the words in question were to be understood in the manner contended for by the defendant. If these words referred to title, the stipulation as to non-production of the lessor's title would be wholly unnecessary. With regard to the second expression, namely, that the plaintiff was not to require the lessor's title, its effect is merely to exempt the vendor from the necessity of proving that his title is as good. In *White* v. *Foljambe* (*a*), Lord *Eldon* says, "Do you carry it to the extent that the defendant could not be permitted to shew you had a bad title (*b*)? The plaintiff's case is quite clear of any difficulty. His objection is not to the lessor's title, but to that of the lessee. *Thomas Brandon*, who created the power (*c*) under which the leases were executed, must

(*a*) 11 Ves. 337.

(*b*) *Ibid.* 339.

(*c*) The title of an appointee is the same as if the estate had been expressly limited to him by name in the deed creating the power. Sir *Edward Clere's* case, 6 Co. Rep. 18; Lady *Gresham's* case, F. Moore, 261; *Middleton* v. *Crofts*, 2 Atk. 661; *Roach* v. *Wadham*, 6 East, 289, & 2 Smith, 376; *Maundrell* v. *Maundrell*, 10 Vesey, 255; *Ray* v. *Pung*, 5 B. & A. 561; *Doe* d. *Wigan* v. *Jones*, 10 B. & C. 458; 3 Johns. (American) Chancery Reports, 550. For some

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be considered as the lessor. The plaintiff does not dispute the title of *Brandon* as lessor; but he says that *Brandon* did not demise. There is another objection founded upon a variance between the defendant's title and that which he contracted to sell. The agreement treats these leases as concurrent leases. A fair presumption upon this memorandum is, that the defendant was selling the leases under which he held the premises. They should have been leases to which his possession could be attributed. The cases of *White* v. *Foljambe* (*a*) and *Deverell* v. *Lord Bolton* (*b*) are extremely apposite. [*Bayley*, J. In *White* v. *Foljambe* it was said that he held *the residue of a term;* here the interest is described.] There they would be supposed to be leases of different parts; *Deverell* v. *Lord Bolton.*

Campbell, contrà. This is a case of extreme hardship upon the defendant, who had most carefully guarded himself against warranting a complete title, and declared to the broker that he would not sell any title but what he had. No bad faith can be imputed to the defendant, it being entirely the fault of the plaintiff that the bargain has not been carried into effect. To begin with the last point which has been made on the part of the plaintiff. No fraud and no misdescription are chargeable upon the defendant, and he has been at all times ready to execute an assignment. In *White* v. *Foljambe* and in *Deverell* v. *Lord Bolton* there was misdescription. In the former of these cases the interest of the vendor was described as one term of 50 years, whereas he held under two terms. The incum-

purposes, however, the appointment is treated as a distinct substantive act. It is considered as a conveyance with reference to the provisions of 27 *Eliz.* c. 4, as to fraudulent conveyances, *Duke of Marlborough* v. *Lord Godolphin*, 2 Vez. sen. 61, 65; and with reference to the statutes requiring registration, *Scrafton* v. *Quincey*, ib. 413. So, the appointee is looked upon as a party claiming under the appointor within a covenant against the acts of persons claiming *under* the appointor; *Hurd* v. *Fletcher*, 1 Dougl. 43. And see *Bartlet* v. *Ramsden*, 1 Keble, 570; *post*, 200 (*a*).

(*a*) 11 Vesey, 337.

(*b*) 18 Vesey, 505.

brances also will dispose of that case as an authority. Here there is an express allegation in the declaration which may always be adverted to, of the existence of the two leases. [*Bayley*, J. No question is referred to us as to the form of the declaration; the question is, whether this was a warranty of title, or merely an undertaking to assign what he has.] It is of the last importance that parties should be able to stipulate so as to avoid any questions of title. There are few titles in which a conveyancer will not discover defects. The words "as he holds the same," relate to the title. The antecedent referred to is the lease. The words are a qualification of the vendor's engagement. It is said that he knew the objection to the lessor's title; if so, the case of *Freme* v. *Wright* (*a*) is very nearly in point. In that case a party who had contracted with assignees to purchase the interest of the bankrupt *under such title as he lately held the same*, was compelled to accept a lease which the lessor had no power to make. [*Littledale*, J. That is not the case here. The plaintiff does not mean to say that the testator had not a good title.] It is not shewn that *Carter* did not assign to *Watkins*. It is necessary to refer to the title of the lessor, in order to attack the lease in question. That the purchaser has precluded himself from doing. Then it is objected that the interest is only equitable. In *Alpass* v. *Watkins* (*b*) the Court said, that upon a question as to the right to a return of the deposit, they would only look to the legal title. It is true, that in *Elliott* v. *Edwards* (*c*) it was held, that the liability of the purchaser in equity was a sufficient objection; but that was a case of an actual incumbrance to the extent of the purchase-money, which the vendor had not paid. [*Parke*, J. Primâ facie a party bargains for a good title in equity as well as at law.] The agreement was qualified to meet certain objections to the title of the lessor.

(*a*) 4 Madd. 364.
(*b*) 8 T. R. 516.
(*c*) 3 B. & P. 181. And see *Maberly* v. *Robins*, 5 Taunt. 625; 1 Marsh. 258.

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Jardine, in reply. The plaintiff bargained for a good derivative title. In *Curling* v. *Shuttleworth* (*a*) the Court of Common Pleas thought that the purchaser was not bound to proceed where even a reasonable doubt existed. [*Bayley*, J. There must be a good title. There can be no middle course, *Romilly* v. *James* (*b*).] It is admitted that if the present case fell within *Freme* v. *Wright*, a difficulty might arise. That case, however, has since been overruled. [*Parke*, J. The question is, whether this is the lease of the person who executed the indenture, or of the donor of the power. At the time the contract is entered into, the existence of the power is unknown. The point to be considered is, what was the meaning of the contract at the time it was made.] In the *Earl of Uxbridge* v. *Bayley* (*c*) it is said, that "whenever parties have power by deed to do a particular act, when done under the power it is as if incorporated in the original deed when executed." [*Parke*, J. The rule is thus laid down in *Purvis* v. *Rayer* (*d*), "It is a general rule in equity, that if a person, generally speaking, offer any thing for sale, the vendee is entitled to see that the vendor has it with the qualification and in the way in which he the vendee understood that he bought it."]

BAYLEY, J.—I cannot say that I entertain any doubt in this case. The plaintiff has all that he bargained to have. He is bound to pay the purchase-money, or at least he is not entitled to recover back the deposit. At the time of the sale the defendant had two leases, under which the purchaser might occupy during the whole period of 28 years mentioned in the agreement, if the leases were valid; and if he were evicted he would have his remedy against the trustee upon the implied covenant contained in the word "demise," which is found in both leases (*e*). The defendant

(*a*) 6 Bingh. 121.

(*b*) 6 Taunt. 263; 1 Marsh. 592.

(*c*) 1 Ves. jun. by Lord Commissioner *Ashhurst*.

(*d*) 9 Price, 488, 518.

(*e*) That the assignee of the lessee may maintain covenant on the word *dimisi*, see the dictum of *Brown*, J., Dyer, 357 b.

In the present case, however,

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agrees to sell, not the Rockingham Arms, but "the two leases and good-will in trade of the house and premises, for the sum of 425*l.*, as he holds the same for the term of 28 years." Now it is objected on the part of the plaintiff, that these words must be understood to mean not two consecutive, but two concurrent leases; and *White* v. *Foljambe* and *Deverell* v. *Lord Bolton* are referred to. But in those cases the language of the contract is very different; there one term is spoken of, whereas here, as the contract speaks of two leases and one rent, the leases might be either consecutive or concurrent. There is, however, one clause which shews them to be consecutive. The premises are described as being held at one rent. The defendant having bargained to sell the two leases and the good-will, &c., the plaintiff agrees to accept an assignment of the said leases and premises as above described, without requiring the lessor's title. The money is to be paid for an assignment of the leases and premises; and this without requiring the lessor's title. The only fair construction of the agreement is, that the defendant is to sell the leases only, and that his title to those leases is not to be questioned. The plaintiff may have possession of the premises during the whole term; if not, he has his remedy over against the party who granted the lease. The plaintiff would therefore become entitled either to the leases or to an equivalent from the lessor. The true construction is, that the defendant sells and assigns the leases only, and that the plaintiff has precluded himself from questioning the plaintiff's title.

LITTLEDALE, J.—I have some doubts, but upon the whole I think that judgment must be for the defendant. One objection is, that the leases are misdescribed in the

both the lease of 1813 and that of 1825 contained covenants against the acts of the lessors, which qualified covenants, while they destroyed the right of action upon the word *dimisi*, (*Nokes's case*, 4 Co. Rep. 80,) gave no remedy against the lessors in respect of the imperfect execution of the power. And see *Falder* v. *Hooker*, 2 Meriv. 427.

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agreement, which must be taken to mean that the premises are held for different terms in different parts of the premises. And this would be the construction if the words had stood alone. To justify that construction, the words should have been, not at the annual rent of 120*l.*, but at several annual rents, amounting in the whole to 120*l.* The expression used in the agreement is satisfied by consecutive leases. The words "as he now holds the same," I consider to be mere words of description, meaning that the vendor has a lease of them for 28 years; not restricting the sale to the interest which the lessor has, but leaving the question of title to be collected from other parts of the instrument. The defendant was not the original lessee, and the plaintiff did not mean to exclude himself from the right of objecting to any defect in the assignments which connected the defendant with the original lessees. But taking the agreement together, it appears that the plaintiff was willing to accept a qualified title. The lessor's title is not to be inquired into. The whole difficulty in the case arises upon the words "without requiring the lessor's title." Then who is the lessor here? The plaintiff contends that *Brandon*, the party who created the power, must be considered as the lessor. In many cases it is so; but in *Isherwood* v. *Oldknow* (*a*) it was held, that a remainder-man taking after tenant for life, who had granted a lease under a power, was entitled, under 32 *Hen.* 8, c. 34, to take advantage of a covenant made with the tenant for life and his *assigns*. Upon the whole I rather think that the construction set up by the defendant is the true one. The purchaser can hardly be supposed to have been willing to accept a lease void under the power. But as nothing is said in the contract about the power, it may be supposed that the parties knew nothing about it (*b*). In speaking of the lessor's title, therefore, they would in all probability

(*a*) 3 M. & S. 382. And see *ante*, 195 (*o*); *Glover* v. *Cope*, Carthew, 205; Skinner, 305; & 3 Lev. 326.

(*b*) Qu. Whether the vendor could set up his own ignorance of the state of his title?

mean the title of the party (*a*) by whom the lease purported to be granted; that, perhaps, is the better mode of construing this agreement.

PARKE, J.—I do not feel much doubt on this question. The action is brought to recover back money paid as a consideration, which has failed, and the expenses which the plaintiff has incurred, on the ground that the defendant has not made a good title. If the defendant has performed all that he undertook to perform, the plaintiff cannot maintain this action, though he may have discovered that his bargain is worth little or nothing. If the defendant is ready to deliver all that he has engaged to deliver, the plaintiff is not entitled to recover. All depends upon the terms of the agreement. It is said that the defendant agreed to assign two concurrent leases. The contract is not very clearly expressed; but the defendant agrees to sell "the two leases and good-will in trade, as he holds the same, for the term of twenty-eight years," and only one rent is mentioned. In *Purvis* v. *Rayer* (*b*) it was held, that under a general contract for the purchase of a lease, the vendee is not bound to take only the instrument and the title which the lessee had under that instrument. This had long before been settled with respect to purchasers of freehold interests. It is, however, competent to parties to enter into a qualified contract. Here the question mainly turns upon the qualification introduced by the words "without requiring the lessor's title." Upon this the plaintiff says, first, that he is at liberty to object to the lessor's title, though the defendant was not bound to produce it. This would be very unreasonable. Then he says, that the title here spoken of, and which is not required to be produced, is the title of the donor, not the title of the party making the lease. At the time of entering into this agreement the parties knew

(*a*) Each lease, however, and particularly the second, distinctly shews that the nominal lessor was a trustee for others.

(*b*) 9 Price, 488, 520.

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nothing about the power. The proviso therefore means, that no objection is to be taken to the title of the party making the lease. We have no evidence that these leases were under a power. That is assumed by the plaintiff. The leases purport to be made by the party who under *Brandon's* will had the whole legal estate out of which the terms were derived. The provision respecting the mode of leasing, only means that the *cetteux que trust* shall not object where the leases are in the form prescribed. Upon the true construction of this agreement therefore every thing has been done which on the part of the defendant ought to have been done.

Postea to the defendant.

DOE, on the demise of CHRISTMAS, *v.* OLIVER and OLIVER. Same *v.* OLIVER, ARNOLD, BARTON, READ, BIGGS, STORER, and KNIGHT.

Devise of lands to *A.* for life, remainder to the children of *B.* living at the time of *A.*'s death. *B.* left one daughter, who, with her husband, in the lifetime of *A.*, levied a fine to the use of *C.* The fine operates by estoppel only during the life of *A.*, but after *A.*'s death it operates upon the *estate*, vesting the right of possession in *C.*

EJECTMENT for certain messuages and lands, situate in the parish of St. Margaret, in the town and borough of Leicester. Plea, not guilty. At the trial before *D'Oyley*, Serjt., at the Leicester Summer Assizes, 1828, a verdict was found for the plaintiff by consent, subject to the opinion of this Court upon the following case:—

Theophilus Holmes, being seised in fee of certain tenements, by his last will and testament in writing, bearing date 29th September, 1784, duly executed and attested for the purpose of passing real estates, gave and devised as follows:—"I give and devise the messuage or tenement wherein I now dwell, with the appurtenances thereto belonging, and the use of all my household goods, plate, linen, and other household furniture of every sort and kind which shall be about my said messuage or tenement at the time of my decease and also my messuage or tenement in Belgrave Gate, Leicester,

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unto my wife *Christian Holmes* for and during her natural life; and from and after her decease, I give and devise the said messuage or tenement wherein I now dwell, with the appurtenances, and also my said messuages or tenements" (in the said will described, being those for the recovery of which these actions are brought,) " with warehouses, stables and other buildings, yards, gardens, and backsides thereto belonging, in case I shall die without issue (but not otherwise), unto, between and among all the children of my brother, the Rev. Mr. *William Holmes*, that shall be living at the time of my said wife's decease, and to their heirs and assigns for ever."

The testator died, seised of the premises in question, in September, 1785, without issue, and without altering or revoking his said will. On his death his widow, who afterwards married *Joseph Chamberlain*, entered into possession of the tenements in question, and so continued until the time of her death, which happened in or about September, 1826. The *William Holmes*, mentioned in the will of the testator, had issue three children only, viz. *James-Harriman*, *Ann-Mary*, and *Thomas-Bradgate*. *James-Harriman Holmes* and *Thomas-Bradgate Holmes* died without issue in the lifetime of the testator's widow. *Ann-Mary Holmes* married *Joseph-Brooks Stephenson*, and was the only child of *William Holmes* living in March, 1814, and at the time of the death of the testator's widow.

On the 4th March, 1814, and during the lifetime of the testator's widow, by indenture duly made between the said *J. B. Stephenson* and *Ann-Mary*, his wife, (therein described as devisee named in the last will of the said *Theophilus Holmes* then deceased,) of the first part, *J. Connor*, Gent., of the second part, *Charles Waldron* of the third part, and *Thomas Chandless*, Gent., a trustee on behalf of the said *Charles Waldron*, and also of the said *J. B. Stephenson* and *Ann-Mary* his wife, of the fourth part; the latter, in consideration of 600*l.*, granted to *Charles Waldron*, his executors, administrators and assigns, for and during

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their natural lives and the life of the survivor, an annuity of 100*l.* to be charged upon and issuing out of the said messuages or tenements devised by the will of *Theophilus Holmes;* and for better securing the payment, granted, bargained and sold to *Thomas Chandless,* his executors, &c., all the said premises, to hold, from and immediately after the decease of *Christian Holmes,* for the term of ninety-nine years. And then, after reciting that the said *J. B. Stephenson* and *Ann-Mary,* his wife, did, as of Hilary term then last, levy before the Court of C. P. at Westminster unto *T. Chandless* and his heirs, one fine *sur conusance de droit come ceo,* &c., of the said premises, by the description of seven messuages, seven gardens, and one acre of land, with the appurtenances, in the parish of St. Margaret, in the town and borough of Leicester, of which fine no uses had as yet then been declared, it was by the said indenture agreed and declared that the said fine should be and enure, in the first place, for confirming the said yearly rent-charge of 100*l.* and, in the next place, to the use of *T. Chandless,* his executors, &c., for and during the said term of ninety-nine years. The said last mentioned indenture was duly executed by the parties, and a receipt for the consideration money indorsed, and a memorial of the same was duly inrolled in the Court of Chancery. The fine referred to by the said indenture was duly levied according to the same in Hilary term, 54 *Geo.* 3, with proclamations. On the 11th April, 1823, *T. Chandless* died, having made a will and several codicils, and appointed Sir *William Long,* Knt. and *Henry Gore Chandless,* executors. On the 27th January, 1827, by indenture of that date, between the said *C. Waldron* of the first part, the said executors of *T. Chandless* of the second part, *Newbold Kinton,* one of the lessors of the plaintiff, of the third part, and *James Christmas,* one other of the said lessors, of the fourth part, for the consideration therein expressed, the said annuity was assigned to the said *N. Kinton;* and the said term of ninety-nine years, for securing the same, was assigned to the said *J. Christmas.*

On the 4th June, 1827, 1275*l.* became due in respect of the said annuity. The day of the demises laid in the declaration is the 1st November, 1827.

The questions for the opinion of the Court are,

First, whether *A. M. Stephenson*, who was the only child of *William Holmes* living on the 4th March, 1814, and at the time of the death of *Christian Holmes* (afterwards *Chamberlain*), took a vested or contingent remainder under and by virtue of the will of *Theophilus Holmes*; Secondly, whether the fine levied by Mr. and Mrs. *Stephenson* worked any forfeiture of the estate of the latter, or transferred any interest therein.

The case was argued at the sittings in Banc after Trinity term, 1827, by *Preston* (with whom was *Denman*) for the plaintiff, and by *N. R. Clarke* for the defendant.

It was admitted, on the part of the plaintiff, that the estate given by *Theophilus Holmes* to the children of *William Holmes* was contingent during the lifetime of the testator's widow; but it was contended, that the fine levied by the daughter of *W. Holmes*, though operative only by way of estoppel during the lifetime of the testator's widow, operated after her death, when the contingency happened, on the estate which then became vested in the daughter of *W. Holmes*. And the cases of *Vick* v. *Edwards* (*a*), *Helps* v. *Hereford* (*b*), and *Davies* v. *Bush* (*c*) were cited, and relied on.

For the defendant it was contended, that the estate given to the daughter of *W. Holmes* could not be conveyed by the fine levied during the lifetime of the widow of *T. Holmes* the testator, because a contingent remainder could not be so conveyed; and, therefore, that the estate still remained vested in Mr. and Mrs. *Stephenson*. That the fine levied by them operated by way of estoppel only, and that of that a stranger was not entitled to take advantage. And

(*a*) 3 P. Wms. 372.
(*b*) 2 Barn. & Ald. 242.
(*c*) 1 M'Clel. & Y. 58.

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for the last position *Doe* v. *Martyn* (*a*) was cited and relied on.

The Court took time to consider of their judgment, which was now delivered by

BAYLEY, J.—This case depended upon the effect of a fine levied by a person who had a contingent remainder in fee. The short facts were these: *Ann-Mary*, the wife of *Joseph-Brooks Stephenson*, was entitled to an estate in fee upon the contingency of her surviving *Christian*, the widow of *Theophilus Holmes*; and she and her husband conveyed the premises to *Thomas Chandless* for a term of ninety-nine years, and levied a fine to support that conveyance. *Christian*, the widow, died, leaving Mrs. *Stephenson* living; so that the contingency, upon which the limitation of the estate to Mrs. *Stephenson* depended, happened, and this ejectment was brought by the assignees of the executors of *Thomas Chandless*, in whom the term of ninety-nine years was vested. It was admitted in argument on the part of the defendant, that the fine was binding upon Mr. and Mrs. *Stephenson*, and all who claimed under them, by estoppel; but it was insisted that such fine operated by way of estoppel only; that it, therefore, bound only parties and privies, not strangers; that the defendant, not being proved to come in under Mr. and Mrs. *Stephenson*, was to be deemed, not a privy, but a stranger; and that, as to him, the estate was to be considered as still remaining in Mr. and Mrs. *Stephenson*. In support of this position reliance was placed upon the latter part of the judgment delivered by me in the case of *Doe* d. *Brune* v. *Martyn* (*a*), and that part of the judgment certainly countenances the present defendant's argument. But the reasoning in that case proceeds upon the supposition that a fine by a contingent remainder-man operates by estoppel, *and by estoppel only*; its operation by estoppel, which is indisputable, was sufficient for the purpose of that decision; whether it operated

(*a*) *Ante*, ii. 485; 8 B. & C. 497.

by estoppel only, or whether it had a further operation, was perfectly immaterial in that case; and the point did not there require that investigation which the discussion of this case has rendered necessary. We have, therefore, given the subject that further consideration which it required, and we are satisfied, upon the authorities, that a fine by a contingent-remainder-man, though it operates by estoppel, does not operate by estoppel only, but has an ulterior operation when the contingency happens; that the estate which then becomes vested feeds the estoppel; and that the fine operates upon that estate, as though that estate had been vested in the conusors at the time the fine was levied.

The first authority which it is necessary to notice is *Rawlins*'s case (*a*). There, *Cartwright* demised land, not his own, to *Weston*, for six years. *Rawlins*, who owned the land, demised it to *Cartwright* for twenty-one years; and *Cartwright* re-demised it to *Rawlins* for ten years. It was resolved that the lease by *Cartwright*, when he had nothing in the land, was good against him by conclusion, and that when *Rawlins* re-demised to him, then was *his interest* bound by the conclusion; and that when *Cartwright* re-demised to *Rawlins*, then was *Rawlins* concluded also. *Rawlins*, indeed, was bound as privy, because he came in under *Cartwright*; but the purpose for which I cite this case is, to shew that as soon as *Cartwright* got the land, his interest in it was bound. In *Weale* v. *Lower* (*b*), the case was thus: *Thomas*, a contingent-remainder-man in fee, demised to *Grylls* for five hundred years, and levied a fine to *Grylls* for five hundred years, and died. The contingency happened, and the remainder vested in the heir of *Thomas*, and whether this demise was good as against the heir of *Thomas* was the question. It was argued before *Hale*, C. J., and his opinion was, that the fine did operate at first by conclusion, and passed no interest, but bound the heir of *Thomas*; that the estate, which came to the

(*a*) 4 Co. Rep. 52. (*b*) Pollexf. 54.

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heir when the contingency happened, fed the estoppel; and then the estate by estoppel became an estate in interest, and of the same effect as if the contingency had happened before the fine was levied: and he cited *Rawlins*'s case, 4 *Coke*, 53, in which it was held, that if a man leased land in which he had nothing, and afterwards bought the land, such lease would be good against him by conclusion, but nothing in interest till he bought the land; but that as soon as he bought the land, it would become a lease in interest. The case was again argued before the Lord Chancellor, Lord Chief Justice *Hale*, *Wild*, *Ellis*, and *Windham*, justices, and they all agreed that the fine at first enured by estoppel; but that when the remainder came to the conusor's heir, he should claim in nature of a descent, and, therefore, should be bound by the estoppel; and then the estoppel was turned into an interest, and the conusee had then an estate in the land. In *Treviban* v. *Lawrence* (*a*), Lord *Holt* cites 39 *Ass.* 18 (*b*), and speaks of an estoppel as creating an interest in or working upon the estate of the land, and as running with the land to whoever takes it. In *Vick* v. *Edwards* (*c*), cited by Mr. *Preston*, Lord *Talbot* must have considered a fine by a contingent-remainder-man as having the double operation of estopping the conusors till the contingency happened, and then of passing the estate. There lands were devised to *A.* and *B.* and the survivor, and the heirs of such survivor, in trust to sell. Upon a reference to the master, he reported that they could not make a good title, because the fee would vest in neither till one died. On exceptions to the master's report, Lord *Talbot* held that a fine by the trustees would pass a good title to the purchaser by estoppel; for though the fee was in abeyance, one of the two trustees must be the survivor, and entitled to the future interest; consequently, his heirs claiming under him would be estopped

(*a*) 2 Ld. Raym. 1048; 6 Mod. 258.

(*b*) Fol. 237, where it was said by *Cavendish*, arguendo, that if a man brings a writ of error, and then purchases the land, he is ousted of the error for ever.

(*c*) 3 P. Wms. 371.

by reason of the fine by the ancestor, from saying *quod partes finis nihil habuerunt*, though he that levied the fine had at the time no right or title to the contingent fee. On the following day, he cited the case of *Weale* v. *Lower* (*a*), which I have before cited. Now, whether Lord *Talbot* was right in treating the fee as being in abeyance, and the limitation to the survivor and his heirs as a contingent remainder, or not, it is evident he did so consider them; and he must have had the impression that the fine would have operated, not by estoppel only, but by way of passing the estate to the purchaser, because, unless it had the latter operation as well as the former, it would not pass a good title to the purchaser.

Mr. *Fearne*, in his work on Remainders, c. 6, s. 5, says, "We are to remember, however, that a contingent remainder may, before it vests, be passed by fine by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency;" and after stating the facts in *Weale* v. *Lower*, he says, "It was agreed that the contingent remainder descended to the conusor's heir; and though the fine operated at first by conclusion only, and passed no interest, yet the estoppel bound the heir; and that, upon the contingency, the estate by estoppel became an estate in interest, of the same effect as if the contingency had happened before the fine was levied."

Upon these authorities, we are of opinion that the fine in this case had a double operation—that it bound Mr. and Mrs. *Stephenson* by estoppel or conclusion so long as the contingency continued; and that when the contingency happened, the estate which devolved upon Mrs. *Stephenson* fed the estoppel; the estate created by the fine, by way of estoppel, ceased to be an estate by estoppel only, and became an interest, and gave Mr. *Chandless*, and those having a right under him, exactly what he would have had in case the contingency had happened before the fine was levied.

Judgment for the Plaintiff.

(*a*) Pollexf. 54.

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MUSKETT and others, Assignees of TAYLOR, a Bankrupt, *v.* DRUMMOND.

In an action by the assignees of *A.*, where the petitioning creditors are the assignees of *B.*, the proceedings under *B.*'s commission are not evidence, under 6 *Geo.* 4, c. 16, s. 92, of the bankruptcy of *B.*

An order by the Lord Chancellor under 6 *Geo.* 4, c. 16, s. 18, substituting a new petitioning creditor's debt for one alleged in the petition to be insufficient to support a commission, is invalid if it direct the commissioners to inquire only as to the sufficiency of the new debt, and is silent as to the insufficiency of the old.

Whether a valid order under that section made pendente lite, would be evidence against a party who had no notice of such order, *quære.*

TROVER by the plaintiffs, as assignees of *Taylor*, to recover certain goods and chattels, the stock in trade and household furniture of the bankrupt, alleged to have been taken and converted by the defendant after the bankruptcy. Plea, not guilty; with notice of disputing the petitioning creditor's debt, the trading and the act of bankruptcy. At the trial before Lord *Tenterden*, C. J., at the London adjourned sittings after Hilary term, 1828, a verdict was found for the plaintiffs, damages 427*l.*, subject to the opinion of this Court upon the following case:—

The bankrupt *Taylor*, for several years previous, and down to the time of the issuing of the commission of bankrupt against him, carried on the trade and business of a builder, at Balham Hill, in the county of Surrey. On the 15th November, 1826, and two or three days previously, he committed two several acts of bankruptcy. On the 18th November, 1826, one *Samuel Rothwell* issued a *fieri facias* directed to the defendant, then sheriff of the county of Surrey, commanding him to levy 440*l.* 4*s.* on the goods and chattels of the bankrupt, under which writ the defendant, on the same 18th November, seized, and afterwards sold, the goods and chattels mentioned in the declaration. The commission under which *Taylor* was adjudged bankrupt issued on the 9th December, 1826, and the plaintiffs were afterwards duly chosen assignees, and the usual assignment was made to them on the 29th December, 1826. The commission issued on the petition of the assignees of one *James Kenworthy*, a bankrupt, to whom, prior to and at the time of his bankruptcy, *Taylor* was indebted in the sum of 150*l.* and upwards. The commission, adjudication, and assignments, and other proceedings in the bankruptcy of *Kenworthy*, were given in evidence, duly entered of record. That commission was dated 6th

November, 1826, and the assignment to the provisional assignee was on the same day, and that to the plaintiffs on the 25th November, 1826; but no other evidence was given of the petitioning creditor's debt, trading, or act of bankruptcy, than by the production of such proceedings. The present action was commenced on the 24th January, 1827. The notice to dispute was given on the 17th February, 1827. An order of the Lord Chancellor was put in and proved, dated 25th February, 1828. The order was made under the statute 6 *Geo.* 4, c. 16, s. 18, (*a*) on the petition of the plaintiff *Muskett*, which it set forth. That petition stated, that the commission against *Taylor* had issued on the petition of the assignees of *Kenworthy;* that *Taylor* had been declared a bankrupt; that *Muskett* and the other plaintiffs in this cause had been appointed his assignees; that an action of trover having been brought, it had been found, on preparing for trial, that the petitioning creditor's debt was not such a legal debt as would support a commission, and that it would be necessary, in order to support the commission, that there should be another petitioning creditor's debt substituted in the place of that of the assignees of *Kenworthy;* that before and at the time of issuing the commission, the petitioner was a creditor of the bankrupt to the amount of 552*l.*; that his debt was incurred subsequently to that of the assignees of *Kenworthy*, and that he had proved that debt under the commission. The prayer was, that the commission might be supported by, and the proceedings carried on, upon the debt of the petitioner, instead of that of the assignees of *Kenworthy*.

(*a*) Which enacts, "that if after adjudication the debt or debts of the petitioning creditor or creditors, or any of them, *be found insufficient* to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor or creditors, having proved any debt or debts sufficient to support a commission, (provided such debt or debts has or have been incurred not anterior to the debt or debts of the petitioning creditor or creditors,) to order the said commission to be proceeded in; and it shall by such order be deemed valid."

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The order then stated, that upon hearing the petition and the affidavits filed in support thereof read, and what was alleged by the counsel for the petitioner and the counsel for the assignees of *Kenworthy*, the latter appearing and consenting thereto, the Lord Chancellor ordered, that upon the commissioners named in the commission being satisfied that the debt proved by *Muskett* was incurred not anterior to the debt of the assignees of *Kenworthy*, and that it was an existing debt, and sufficient to support the commission, the commission should be proceeded in; and his lordship referred it to the said commissioners to make the inquiry.

The commissioners did find that *Muskett*'s debt was an existing debt, and sufficient to support the commission; and that it had been incurred subsequently to that of the assignees of *Kenworthy*; also that a debt amounting to 492*l.* was due to *Muskett* previously to, and at the time of the committing of, the acts of bankruptcy by *Taylor*, and the issuing of the commission against him, and is now due. It was objected on the part of the defendant, first, that the title of the assignees of *Kenworthy* to become petitioning creditors was not sufficiently proved; and, secondly, that the order of the Lord Chancellor, and the proceedings under it, were not sufficient proof of a debt to sustain the present action.

Hutchinson, for the plaintiffs. The first objection taken to the right of the plaintiffs to recover in this action is, that there is not sufficient evidence of the title of the assignees of *Kenworthy* to be petitioning creditors. Now, by the 6 *Geo.* 4, c. 16, s. 92 (*a*), where the bankrupt has

(*a*) Which enacts, "that if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he was out of the United Kingdom) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions

not given notice to dispute the commission, the proceedings before the commissioners are made conclusive evidence of the matters therein contained, in all actions at law, or suits in equity, brought by the assignees for any debt for which the bankrupt might have sued. Here the proceedings under *Kenworthy*'s commission were produced, and the debt was one for which *Kenworthy* might have sued, therefore the proceedings are sufficient evidence. [*Parke*, J. Is a commission of bankrupt an action at law, or a suit in equity (*a*), within the meaning of the statute?] *Kenworthy*'s assignees might have sued *Taylor;* and if they had, *Skaife* v. *Howard* (*b*) is an authority to shew that the proceedings would have been sufficient evidence in that suit. [*Bayley*, J. No. That case only decided that the depositions which were made evidence by the statute 49 *Geo.* 3, c. 121, s. 10, were *primâ facie* evidence of the facts contained in them.] Secondly, it is objected, that the Lord Chancellor's order, substituting *Muskett* as petitioning creditor instead of the assignees of *Kenworthy*, having been made after the present action was commenced, could not have a retrospective effect, and therefore could not furnish evidence of a petitioning creditor's debt sufficient to support the action. But the very object of the statute 6 *Geo.* 4, c. 16, s. 18, seems to be, by substituting a new petitioning creditor's debt, to render the commission valid *ab initio*, in order to prevent the just title of assignees from being defeated upon objections beside the merits. If that be so, (and if it be not so, the provisions of s. 18,

taken before the commissioners at the time of, or previous to the adjudication, of the petitioning creditor's debt or debts, and of the trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, *in all actions at law, or suits in equity*, brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit."

(*a*) As an authority that a commission of bankrupt is not an action or suit, see the case of *Guthrie* v. *Fisk*, 5 D. & R. 24; 3 B. & C. 178.

(*b*) 4 D. & R. 37; 2 B. & C. 560.

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would seem to be wholly nugatory,) this commission is rendered valid *ab initio*, and all the proceedings under it are as regular as if it had been originally sued out upon the petition of *Muskett*, whose debt is now substituted for that of the assignees of *Kenworthy*.

Thesiger, contrà, upon the second point, to which the Court desired him to confine his attention. The Lord Chancellor's order cannot have a retrospective operation; and if not, it cannot support the present commission. The assignees have no right to use the order for the purpose of maintaining the present action; for they had no title at the time when they commenced the action, and therefore cannot be allowed to support it by a title subsequently acquired. The power given to the Lord Chancellor by s. 18, is confined to the working the commission, and does not extend to the carrying on actions at law or suits in equity. The dates in this case are not unimportant; the notice to dispute the petitioning creditor's debt is given on the 17th of February, 1827, and the order for substituting the new debt is obtained on the 25th of February, 1828, an interval of somewhat more than a twelvemonth. [*Parke*, J. It was held in *Hull* v. *Pickersgill* (*a*) that an uncertificated bankrupt could not maintain an action of trespass against subsequent creditors for breaking open his house and seizing his after-acquired property, although his assignees did not ratify the seizure, and were unknown to the defendants until after the commencement of the action.] To give this order a retrospective effect would be to fix the defendant with the costs of an action, which the plaintiffs in the first instance had no right to bring, and which he might believe he had good grounds to defend. [*Bayley*, J. He might have applied to the Lord Chancellor.] He had no notice of the proceedings before the Lord Chancellor, and had no means of knowing of the existence of the order for substituting a new petitioning creditor's debt until it was pro-

(*a*) 3 J. B. Moore, 612; 1 Brod. & B. 282.

duced at the trial. Besides, the Lord Chancellor's order does not find the fact upon which alone he had jurisdiction to make it. It is no where found by him that the original petitioning creditor's debt was insufficient. His order merely recites that the petition presented to him asserted that fact; and in the reference which he directs to the commissioners, he does not require them to examine into the alleged insufficiency of that debt, but merely into the sufficiency of the debt proposed to be substituted. The order, therefore, does not shew that the Lord Chancellor had jurisdiction, within the words of s. 18, to make it, and is consequently bad in toto. [*Parke*, J. There is certainly no evidence that the Lord Chancellor found the original petitioning creditor's debt to be insufficient. *Bayley*, J. And there may be a great difference between a petition founded on the insufficiency of the debt, and on the mere difficulty of proof. The jurisdiction of the Lord Chancellor certainly seems to be confined to the former.]

Hutchinson, in reply. The Court will presume that the Lord Chancellor was satisfied of the truth of the facts stated in the petition, before he made his order. That order was never appealed against, nor were any attempts ever made to reverse or alter it; the present objection, therefore, comes too late. Unless when made, it had a retrospective effect, it would be altogether inoperative. To hold it now inoperative would be productive of great inconvenience; for the proofs of debts, the choice of assignees, the assignment to them, and all conveyances by them, would be thereby invalidated; and many questions would also arise as to the effect of the prior examinations of the bankrupt.

The case was argued at the sittings in Banc after Easter term, 1829, when the Court took time for consideration. Judgment was now delivered by

BAYLEY, J.—This was an action brought by the assignees of *James Taylor*, a bankrupt, and the defendant having

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given notice to dispute, among other things, the petitioning creditor's debt, there were two questions: one, whether there was sufficient proof of the petitioning creditor's debt, the other, whether the plaintiffs had entitled themselves to resort to a debt due to *Muskett*, one of the assignees, to support the commission, under the 6 *Geo.* 4, c. 16, s. 18.

The commission against *Taylor* was sued out by the assignees of *James Kenworthy*, a bankrupt, and the debt to *Kenworthy* and the assignment to his assignees were duly proved; but there was no evidence to support the commission against him, except the proceedings under his commission: and whether they were sufficient evidence of the debt from him to his petitioning creditor, or of his trading and act of bankruptcy, was the first question in this case. The Court intimated an opinion during the argument that they were not, and that opinion is confirmed by the consideration we have since been able to bestow upon the point. It is clear that these proceedings are not evidence except as far as they are made so by act of parliament, and it is only by the ninety-second section of the late bankrupt act, 6 *Geo.* 4, c. 16, that they are made evidence in any case. The ninetieth and ninety-first sections having provided, that in actions by or against assignees, or in actions against commissioners or persons acting under their warrant, or in suits in equity by or against assignees, no proof shall be required of the petitioning creditor's debt, the trading, or act of bankruptcy, unless upon notice; the ninety-second section enacts, that if the bankrupt shall not have given notice, the depositions taken before the commissioners of the petitioning creditor's debt, the trading, and act of bankruptcy, shall be conclusive evidence of the matters therein contained *in all actions at law or suits in equity brought by the assignees* for any debt or demand for which the bankrupt might have sustained any action or suit. It is only, therefore, in actions or suits brought by *his own* assignees for a debt or demand for which *he* might have sued, that the depositions under a commission against a man are made evidence; and as this action was brought, not by *Ken-*

worthy's assignees, but by *Taylor*'s, and for a demand for which *Taylor* alone, not *Kenworthy*, could have sued, the depositions under *Taylor*'s commission were within the provision, and would have been evidence, the depositions under *Kenworthy*'s commission would not.

The second question depends upon the 6 *Geo.* 4, c. 16, s. 18, and the right of the plaintiffs to resort to it in support of this action. By that clause it is enacted, that if after adjudication, the debt of the petitioning creditor *be found insufficient* to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor having proved any debt sufficient to support a commission, and incurred not anterior to the debt of the petitioning creditor, to order the said commission to be proceeded in, and it shall by such order be deemed valid. *Muskett* had proved a debt under the commission, that debt was sufficient to support the commission, and was incurred after the debt to *Kenworthy*, and he petitioned the Lord Chancellor for an order under this clause. The Lord Chancellor made an order, that upon the commissioners being satisfied as to *Muskett*'s debt in the several particulars which the clause specifies, the commission should be proceeded in; and the commissioners were satisfied. That petition was not produced, nor the affidavits on which it was grounded; but according to the recital of it in the Lord Chancellor's order, which was produced, it stated that the debt was not such a legal debt as would support a commission, and the prayer of it was, that the proceedings therein might be supported by and carried on on *Muskett*'s debt instead of *Kenworthy*'s. The Lord Chancellor's order says nothing as to the insufficiency of the debt; but, upon reading the affidavits, hearing counsel for *Muskett* and the other assignees of *Taylor*, and the petitioning creditor consenting thereto, it orders that, upon the commissioners being satisfied as to the sufficiency of *Muskett*'s debt, and the time it was contracted, (as to which the commissioners were afterwards satisfied), the commission

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should be proceeded in. It does not appear that the Lord Chancellor was apprised, when he made the order, of the existence of the present suit, so as to call his attention to the propriety of making any provision as to giving it in evidence in this suit. No notice of the application to the Lord Chancellor appears to have been given to the defendant, against whom this suit was pending, so as to give him an opportunity of interposing in the Court of Chancery, to prevent its being improperly used to his prejudice.

It is not necessary in this case to give any opinion whether a valid order of the Lord Chancellor, under the above mentioned act, would support a commission by relation in an action already commenced, and especially when the opposite party in the suit had no notice of such a proceeding, because we are satisfied that this order is not valid. The statute gives a special power to the Lord Chancellor to make an order of this nature only where the debt of the petitioning creditor "*is found insufficient*;" but in this case, that insufficiency of the debt is not found as a fact by the jury, nor does it appear that it was so found by the Lord Chancellor, the order containing no adjudication by him on that subject. It appears to us, therefore, that the order was not valid.

The Lord Chancellor's order does not import that the debt had been found insufficient before the petition was presented to him; he pronounces nothing as to its sufficiency; and there is no fair ground for presuming that he examined into its sufficiency. The petition does not pray that he should. The order is made *upon the consent* of *Muskett* and the assignees on the one hand, and the petitioning creditor on the other: the defendant, against whom it is to operate is no party to it, and does not appear to have known of it until it was produced against him at the trial; and the conduct of the plaintiffs, in relying upon the debt to *Kenworthy* at the trial, is a pretty strong ground for believing that the Lord Chancellor had not passed any judgment upon its sufficiency. Without entering, therefore,

into the question how far an order by the Lord Chancellor, when he pronounced upon the insufficiency of the original debt, or when such debt had otherwise been judicially found insufficient, would operate upon a depending suit, especially against a party who had no notice of such order, and was not apprised that he would have to meet the substituted debt, we are of opinion that the order in this case is insufficient for that purpose, and that judgment of nonsuit ought to be entered.

Judgment of nonsuit.

HAWKINS and others, Assignees of A. MORTON, RODICK, and C. MORTON, Bankrupts, v. WHITTEN.

In an action by assignees of a bankrupt, the defendant is entitled, under 6 *Geo.* 4, c. 16, s. 50, to set-off a debt due to him from the bankrupt, if, when he gave credit to the bankrupt he had no notice of a prior act of bankruptcy, though he had notice that the bankrupt had stopped payment.

ASSUMPSIT on the money counts. Plea, non assumpsit, with notice of set-off. At the trial before *Holroyd*, J., at the Northamptonshire Spring Assizes, 1827, the case was this:—The action was brought by the plaintiffs as assignees of the bankrupts, who had carried on business as bankers at Wellingborough in Northamptonshire, to recover a sum of 75*l.* the balance of an account, admitted to be due from the defendant to the bankrupts before their bankruptcy. It was also admitted that the defendant was entitled to set off a sum of 10*l.* for goods sold and delivered by him to the bankrupts before their bankruptcy; and the only question in the cause was, whether he was entitled to set off a further sum of 65*l.* under the following circumstances. On the 16th of December, 1825, the defendant got possession of notes of the Wellingborough bank to that amount, after taking some trouble to procure them. On the 14th of December the bankers had stopped payment, and issued the following notice, addressed to the debtors and creditors of the house:—"Messrs. *Morton, Rodick* & Co. hereby give notice, that owing to the alarming state of money matters in London, their agents cannot possibly remit them the funds which are in their hands:

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they are therefore under the painful necessity of suspending their payments for a short time." This notice was printed by the defendant, who was a printer and stationer at Wellingborough. On the same 14th of December, the bankrupts ordered their bank to be closed at half past ten in the morning, which was done accordingly. *A. Morton*, the senior partner, who was eighty years of age, was so much affected, that he became very ill, and was confined to his bed in his dwelling-house, which was distinct from the bank. *C. Morton* stationed one of the clerks at the dwelling-house of *A. Morton*, to inform those who might call why the bank was closed, and then retired to his own dwelling-house in Wellingborough. *Rodick* also retired to his dwelling-house in Wellingborough, but desired the clerk to inform those who might inquire for him, that he should be glad to see them there; and he went to the bank on the 15th of December. The bank continued closed, and many persons applied there for money, but none were admitted; some received no answer, and others were told that they could not be paid. Some persons who called at *A. Morton*'s house were told that he was too ill to be seen, which was true, and that the other partners were at their own houses. Upon this evidence it was contended on the part of the plaintiffs, first, that all the partners had committed an act of bankruptcy on the 14th of December, by absenting themselves from the bank; and, secondly, that as the defendant knew when he took the notes that they had stopped payment, he must be presumed to have also known that they had so committed an act of bankruptcy. For the defendant it was insisted, first, that there was no evidence that the three partners had each committed an act of bankruptcy, because the elder *Morton* had not voluntarily absented himself from the bank, but had been compelled to do so by illness; and, secondly, that assuming an act of bankruptcy had been committed by all the partners, still as there was no distinct proof that the defendant knew of any act of bankruptcy, or of the circumstances supposed to constitute it, at the time when he took the notes, the mere knowledge

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of the insolvency of the bankers did not deprive him of his right of set-off. The learned judge directed the jury to find a verdict for the plaintiffs, but gave the defendant leave to move to enter a nonsuit, if the Court should be of opinion that he was entitled to set off the notes. A rule nisi having been obtained accordingly,

Clarke and *Goulburn* shewed cause. First, the three partners all committed an act of bankruptcy on the 14th of December, for their closing their bank, and absenting themselves from it on that day, constituted an act of bankruptcy by all, *Judine* v. *Da Cossen* (*a*), though the same act done by one only might only have been evidence of an act of bankruptcy by that one; *Mills* v. *Bennett* (*b*). Secondly, the defendant, under the circumstances of this case, *must* be presumed to have known of this act of bankruptcy, and is therefore deprived of his right of set-off. It is clear that he knew at the time when he got possession of the notes that the bankers were insolvent and had stopped payment. Under the old bankrupt acts that degree of knowledge would have been sufficient to bar his right of set-off; *Hodson* v. *Young* (*c*), *Dickson* v. *Evans* (*d*), *Ex parte Stone* (*e*). But admitting that under the late bankrupt act it was necessary, in order to deprive the defendant of his

(*a*) 1 N. R. 234. There, *a trader*, having a counting-house in town and a dwelling-house in the country, left the former, to which he never returned, taking his books with him, and slept at his dwelling-house a few nights, when he finally left that also. It was held, that having quitted his counting-house without the *animus revertendi*, he began to absent himself from that day, within the meaning of the 13 *Eliz.* c. 7, s. 1, and thereby committed an act of bankruptcy. That case does not appear to support the position for which it is cited. See the cases of *Spencer* v. *Billing*, 3 Campb. 312, and *Capper* v. *Desanges*, 3 J. B. Moore, 4; *Deffle* v. *Desanges*, 8 Taunt 671, which appear more applicable. See also *Bernasconi* v. *Farebrother*, *post*; *Gow on Partnership*, 258, 3d ed.

(*b*) 2 M. & S. 556. And see *Ex parte Mavor*, 19 Ves. 543; *Gow on Partnership*, 259, 3d ed.

(*c*) E. T. 1814. Archbold's Bankrupt Laws, 88, cited.

(*d*) 6 T. R. 57.

(*e*) 1 Glyn, & J. 191.

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right of set-off, that he should have had notice of an act of bankruptcy committed by all the bankrupts before he took the notes, the facts of the case supply that notice. He took the notes on the 16th; he knew that the bank was closed on the 14th; he must have known that in the interval, creditors holding notes had applied at the bank for payment of them, and had been unable to obtain it; he must have known, therefore, that all the partners were insolvent and had absented themselves from the bank before the 16th, and had thereby committed an act of bankruptcy.

Adams, Serjt., contrà. Unquestionably the defendant was aware at the time he took the notes that the bank had been closed and the business suspended. But that was an equivocal act. The notice to creditors stated that the bankers were obliged to suspend their payments "for a short time;" and the defendant might reasonably believe that after a short time the bank would be reopened and its business resumed, without any act of bankruptcy having been committed. In point of fact, no act of bankruptcy was proved to have been committed by all or any of the partners between the 14th and the 16th of December; it was impossible, therefore, that the defendant could have notice of any. But the late bankrupt act, 6 *Geo.* 4, c. 16, s. 50, gives the right of set-off in all cases where the party claiming it has no notice, at the time when the credit is given, of an act of bankruptcy by the bankrupt committed. It was incumbent upon the plaintiffs, therefore, to prove actual notice to the defendant of an act of bankruptcy committed; a constructive notice will not satisfy the statute, though even that is wanting here. [Lord *Tenterden*, C. J. If the defendant took the notes, knowing that the bankers had suspended their payments, intending thereby to get twenty shillings in the pound on his own debt, and so defeat the object of the bankrupt act, is not that a fraud upon the statute?] There is no proof that he

had any such intention; but even if there was, the law allows a creditor to do that which the defendant did, and that can hardly be termed a fraud upon a statute which the statute allows to be done.

The case was argued in the course of Michaelmas term, 1827, when the Court took time for consideration. Judgment was now delivered by

BAYLEY, J.—The plaintiffs in this case were the assignees of the partners in the Wellingborough bank, and the question for our decision depended upon the right of the defendant to set off certain notes of that bank, which he had *industriously* obtained after the bank had stopped payment, against a debt due from him to the bank. This turned upon the construction of the 6 *Geo.* 4, c. 16, s. 50. By that section, where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners are to state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him, and what shall appear due on either side on the balance of such account, and no more, is to be claimed or paid on either side respectively, and every debt or demand thereby made provable against the estate of the bankrupt may also be set-off in manner aforesaid against such estate; provided that the person claiming the benefit of such set off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed. Before this statute passed, there were three provisions for setting off mutual debts and credits in cases of bankruptcy; one by the 5 *Geo.* 2, c. 30, s. 28, another by the 46 *Geo.* 3, c. 135, s. 3, and the third by the 5 *Geo.* 4, c. 98, s. 48. The first gave the right of set-off, if the credits were given or the debts incurred at any time before the person became bankrupt, without any qualification. The

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second gave the right, notwithstanding the existence of a prior act of bankruptcy, in the same manner as if there had been no prior act of bankruptcy, provided the credit were given to the bankrupt two calendar months before the date and suing out of the commission, or provided the person claiming the benefit of the set-off had not, at the time of giving such credit, notice of any prior act of bankruptcy committed by such bankrupt, or that he was insolvent, or had stopped payment. The 5 *Geo.* 4, which repeals the 5 *Geo.* 2 and the 46 *Geo.* 3, consolidates the two provisions which I have mentioned in those statutes, but, instead of the concluding provision in the 46 *Geo.* 3, excludes from the beuefit of the set-off such persons only has had, when they gave credit to the bankrupt, notice, either actual or constructive, of an act of bankruptcy by the bankrupt committed, or that he had stopped payment; and the two provisions contained in the 46 *Geo.* 3, were in terms confined, as they probably would before have been confined in construction, to those cases in which there had been a prior act of bankruptcy. At the time, therefore, when the 6 *Geo.* 4, was passed, every man was entitled to the benefit of a set-off, if the credit between him and the bankrupt were given, or the debt between them existed, before any act of bankruptcy had been committed; and he was also entitled, notwithstanding an act of bankruptcy, if the person claiming the set-off had not, when he gave his credit or trusted the bankrupt, notice of an act of bankruptcy by the bankrupt committed, or that he had stopped payment. The 6 *Geo.* 4, takes away the latter part of this qualification, namely, the notice that the bankrupt had stopped payment, and gives the right of set-off in all cases where it existed before any act of bankruptcy committed, and gives it also where there has been a prior act of bankruptcy, if the party claiming the set-off had no notice of the act of bankruptcy.

Notice of insolvency, therefore, or notice of having stopped payment, are no longer ingredients upon this

point. Notice of an act of bankruptcy is alone the criterion or dividing point, and before this period, the defendant takes the notes he claims to set off, and thereby becomes a creditor of the bankrupts and makes them his debtors. It may be true, and we believe is, that he took the notes for the very purpose of making them the subject of his set-off, and of getting, in substance, twenty shillings in the pound upon them; but as this is not prohibited by the statute, we cannot say that it is illegal. As the set-off, therefore, must be allowed, and covers the debt, the rule for entering a nonsuit must be made absolute.

Rule absolute.

SMITH *v.* SHAW.

CASE for injury done to plaintiff's vessel. Plea not guilty, and issue thereon. At the trial before Lord *Tenterden*, C. J. at the London adjourned sittings after Michaelmas term, 1828, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following *case*:—

A dock act authorised a company to make and maintain docks, and to appoint a dock-master, who should have power to direct the mooring, unmooring, moving and removing of all vessels into or in the docks, and should have control over the space of 100 yards from the entrance into the docks, so far as related to

The plaintiff was the owner of the ship *Rebecca*, of 313 tons. The defendant was the treasurer of the Commercial Dock Company. The *Rebecca*, on her homeward voyage from Dantzig, arrived in the River Thames the latter end of June, 1827, and in the afternoon of the 28th of June was made fast to the buoy belonging to the company, it being the plaintiff's intention to discharge his cargo in their dock. In the same afternoon an attempt was made by the company's servants to take the vessel into dock; and in

the transporting of vessels in and out; the company to be sued in the name of their treasurer; and every action brought against any person for *any thing done in pursuance of the act*, to be commenced within six calendar months after the fact committed. In an action brought against the treasurer for damage done to a vessel by means of improper directions given by the dock-master in transporting her into the docks:—*Held*, that *giving such* directions was a thing done in pursuance of the act, and that the action should have been commenced within six calendar months after those directions were given.

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the course of such attempt, *owing to the negligence of the persons employed by the company in that behalf*, the injury detailed in the declaration was sustained. More than six months intervened between the time at which the injury was sustained and the commencement of the action.

By 50 *Geo.* 3, c. 207, intituled, "An act for maintaining and improving the docks and warehouses called the Commercial Docks, and for making and maintaining other docks and warehouses to communicate therewith, all in the parish of St. Mary, Rotherhithe, in the county of Surrey," the Commercial Dock Company was established as a joint stock company, and certain powers were conferred upon the company, which are more particularly set forth in the act (*a*). And by s. 94 it is enacted, "that if any action or suit shall be brought or commenced against any person or persons, bodies politic or corporate, for any thing done in pursuance of this act, every such action or suit shall be brought or commenced within six calendar months after the fact committed, or in case there shall be a continuation of damages, then within two months after the doing or

(*a*) By s. 68, the company were authorised to sue and be sued in the name of their treasurer for the time being.

By s. 71, the directors of the company were authorised to appoint a dock-master, who should have authority to direct the mooring, unmooring, moving and removing of all vessels entering into, lying, or being in the docks, as to the time and manner of their entrance into, lying in, or going out of the same, and their position, loading and discharging therein; and the time of opening and shutting the gates; and in case the owner, master, &c. having the care of any vessel, should refuse or neglect to moor, unmoor, move or remove the same according to such direction, within two hours after notice, then it should be lawful for the dock-master to moor, &c. such vessel, and the charges thereof respectively should be repaid, together with the sum of 10*l.* for each offence, by the owner or master of such vessel.

By s. 72, no vessel should be moored or anchored within the distance of 100 yards of the entrance of the docks, and over that space the dock-master should have control, so far as related to the transporting vessels coming in or going out of the docks.

committing such damage shall have ceased, and not afterwards."

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By 51 *Geo.* 3, c. 66, the powers of the company were enlarged, and were extended to certain premises not comprised in the former act. By s. 20, of the last act, it is enacted, that in case any person or persons shall at any time or times, by or through the negligence, carelessness, or omission of the company, or their servants or workmen, suffer or sustain any damage or injury exceeding the sum of 5*l.*, then and in every such case the whole of the damages so suffered or sustained shall and may be recovered from the company or their treasurer for the time being, in any of his majesty's Courts at Westminster, by action of debt, or on the case, or by bill, plaint, or information, together with costs of suit. And by s. 27 it is enacted, that all the powers, provisions, penalties, forfeitures, clauses, matters and things in the 50 *Geo.* 3, shall extend to, and be executed, applied, used and put in force to all intents and purposes as to this act, and the several matters and things therein contained, and all the clauses, powers and provisions of the 50 *Geo.* 3 and this act shall be put in force, and used and applied for carrying into execution the purposes of the said act and this act; and the said act and this act shall be construed together as one act, as fully and effectually as if all the powers and provisions, matters and things in the said act were repeated and re-enacted in this act, and made part thereof.

The question for the opinion of this Court is, whether this action was commenced by the plaintiff against the defendant in proper time.

R. V. Richards, for the plaintiff. This action was commenced in proper time. The question is, whether the injury complained of was a "thing done in pursuance of the statute," 50 *Geo.* 3, c. 207. The injury is found to have arisen through negligence; the defendant, therefore, has been guilty of a *non-feasance* merely, and that cannot be

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considered as a *thing done* in pursuance of the statute. Even if the directions given by the dock-master can be considered as a thing done by him, still the question is, whether that was such an act, that he might reasonably *suppose* that the statute gave him authority to do it; because if it were, he is within the protection of the statute: otherwise not. That is the rule of construction laid down in *Cooke* v. *Leonard* (*a*), and does not operate in favour of the present defendant, for there was nothing here to lead the dock-master to suppose that he was acting under the authority of the statute, inasmuch as he might have acted precisely the same if no such statute had ever been passed. *Edge* v. *Parker* (*b*) is in principle very like the present case, for there it was held that an entry by assignees into the house of a third person to take the goods of the bankrupt, was not "any thing done in pursuance of" the bankrupt act, 6 *Geo.* 4, c. 16, s. 44. In *Wallace* v. *Smith* (*c*), which may perhaps be cited on the other side, the words of the statute were "in pursuance, *or under colour*" of the act; which are much more general and comprehensive than those of the act in question. The cases in which questions of this nature have arisen upon actions against magistrates and constables, do not apply, because a very liberal construction is given to clauses protecting persons of that description. *Pratt* v. *Hillman* (*d*), and *Gaby* v. *The Wilts Canal Company* (*e*), were cases upon awards, where the Court was concluded by the finding of the arbitrator. *Weller* v. *Toke* (*f*) and *Prestidge* v. *Woodman* (*g*), were actions

(*a*) 9 D. & R. 339; 6 B. & C. 351. "Where an act of parliament provides that in case of any action brought against any person, for any thing done in execution or in pursuance of the act, the defendant shall be entitled to certain privileges, the true meaning is, that the act done must be in its nature such, that the person doing it may reasonably suppose that he had authority from the act of parliament to do it." *Per Bayley*, J., 9 D. & R. 343.

(*b*) 3 M. & R. 365; 8 B. & C. 697.

(*c*) 5 East, 115.

(*d*) 6 D. & R. 360; 4 B. & C. 269.

(*e*) 3 M. & S. 580.

(*f*) 9 East, 364.

(*g*) 2 D. & R. 43; 1 B. & C. 12.

against magistrates. *Parton* v. *Williams* (*a*), was an action against a constable. *Wright* v. *Wales* (*b*) was an action against a fen-reeve. These cases shew that the protection has been generally considered as given only to persons who fill some public situation. In this case, the proper construction of the statute seems to be, to confine the protection which it gives to things done for the purpose of effectuating the principal object of the act, namely, the making and maintaining the docks. The legislature never can have intended to give the company, who derive a profit from carrying on the business of wharfingers and warehousemen, protection in cases where they are guilty of negligence in the conduct of their business. Besides, by the 51 *Geo.* 3, c. 66, s. 20, the company are subjected to a general liability, without any limitation of the time within which an action must be commenced. Under this clause the action seems clearly maintainable.

F. Pollock, contrà. The general object of the clause of limitation was, to protect the company from all claims in respect of any act done by them in pursuance of the act, unless such claims were enforced within a reasonable time, namely, six months after the act done. In order to effectuate that object, the protection ought to be extended to all cases where the company have acted bonâ fide, supposing themselves to be within the authority of the statute, although they have in fact exceeded that authority; and that is the principle laid down in *Blakemore* v. *The Glamorganshire Canal Company* (*c*). The decision in *Edge* v. *Parker* (*d*) does not at all affect the present case, because that proceeded on the ground that the assignees in seizing the goods acted in virtue of their ownership, and not in pursuance of the statute. Here, the very form of the record shews that the act complained of was done in pur-

(*a*) 3 B. & A. 330.
(*b*) 5 Bingh. 336; 2 Moore & P. 613.
(*c*) 3 Younge & J. 60.
(*d*) 3 M. & R. 365; 8 B. & C. 697.

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sance of the statute. The defendant is sued as treasurer of the company, and it was only by virtue of the statute that the plaintiff was enabled to make him defendant. The plaintiff himself, therefore, as was said by Lord *Ellenborough* in *Wallace* v. *Smith* (*a*), has recognised the act of which he complains as done under the statute. The 51 *Geo.* 3 does not vary the case, because that re-enacts all the provisions of the former statute, and provides that the two statutes shall be construed and applied as one. *Sellick* v. *Smith* (*b*) is decisive of the present case. That was an action of trover brought against the treasurer of the West India Dock Company, for refusing to deliver articles deposited in the West India Docks. It was held by *Best*, C. J. at nisi prius, and afterwards by the whole Court of Common Pleas, that the defendant was entitled to the protection of the dock act, which required that actions for any thing done in pursuance or under colour of that act should be brought within three months. There the company were charged with a misfeasance, but so in effect they are here, for the directions given by the dock-master, which caused the injury, must be considered as an act done by him while acting in the discharge of his duty as a servant of the company. *Agar* v. *Morgan* (*c*) also is a strong authority in favour of the present defendant. That was an action brought against a canal company for acts committed in pursuance of an act of parliament, which provided that no plaintiff should recover in an action for any thing done in pursuance thereof, without notice to the defendants of such intended action; and it was held, that a deviation from the line of canal described by the act of parliament, did not deprive the defendants of their right to notice before action brought, on the ground that such deviation was not an act done in pursuance of the act of parliament. The declaration in this case states that the defendant's servants

(*a*) 5 East, 115.
(*b*) 2 Carr. & Payne, 284.
(*c*) 2 Price, 126.

had the care and management of the plaintiff's vessel by virtue of the act of parliament; and unless that were so, the company could not, under any circumstances, be answerable, nor the defendant, as their treasurer, be liable to be sued.

Richards, in reply. Great inconvenience, and even injustice, may follow, if the company are held to be protected in a case like the present. A foreign owner might find it impossible to give instructions to his agent to commence an action within six months. The decision in *Sellick* v. *Smith* (*a*) cannot be supported. Its authority seems to have been doubted in *Carruthers* v. *Payne* (*b*).

Cur. adv. vult.

BAYLEY, J., now delivered judgment.—This was an action brought against the treasurer of the Commercial Dock Company, for damage done to the plaintiff's vessel. The damage resulted from improper directions given by the dock-master of the company, upon an attempt by the vessel to enter the docks, within the limits in which the dock-master was authorised by the dock act to give directions; and the question before us was, whether the action was commenced in time, or whether, under the provisions in the statute which regulate these docks, and give the right to sue the company in the name of their treasurer, it ought not to have been commenced within six calendar months after the directions were given, and the injury done: and we are of opinion that the action was not commenced in time, but that it ought to have been commenced within those six calendar months. The language of the provision in the Commercial Dock Act, 50 *Geo.* 3, c. 207, s. 94, is, that if any action shall be brought against any person, or body politic, for any thing done in pursuance of that act, such action shall be brought within six calendar months next after the

(*a*) 2 Carr. & Payne, 284. (*b*) 5 Bingh. 270; 2 Moore & P. 429.

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fact committed; or in case there shall be a continuation of damages, then within two months after the doing or committing such damages shall have ceased; and the action shall be laid and brought in the county where the matter in dispute shall arise, and not elsewhere. Now, according to the decisions upon similar words, a thing is to be considered as done *in pursuance of the act*, when the person who does it is acting honestly and bonâ fide either in execution of the powers which the act gives, or in discharge of the duties which it imposes. Though he may erroneously exceed the powers the act gives, or inadequately discharge the duties it imposes, yet if he acts bonâ fide in order to execute such powers, or to discharge such duties, he is to be considered as acting in pursuance of the act, and is to be entitled to the protection conferred upon persons while so acting. This is established by *Gaby* v. *The Wilts and Berks Canal Company* (*a*), *Theobald* v. *Crichmore* (*b*), and *Parton* v. *Williams* (*c*): and *Smith* v. *Wiltshire* (*d*) and *Cooke* v. *Leonard* (*e*) establish the same point as to constables and other persons acting in obedience to a magistrate's warrant. Indeed this position was not controverted upon the argument; but the points insisted upon were, first, that the first of the Commercial Dock Acts, 50 *Geo.* 3, c. 207, s. 94, gave the protection in those cases only in which the act done was done for making and maintaining the docks, and did not extend to the conduct of the dock-master in giving directions for transporting vessels into the docks; and, secondly, that the 51 *Geo.* 3, which gives the remedy by action against the company for the negligence, carelessness, or omission of themselves, their servants, or workmen, when the damage exceeds 5*l.*, though it contains a clause which virtually re-enacts and applies to the cases within the latter act, the protection given by the former act, s. 94, did not mean it to apply to actions against the company like

(*a*) 3 M. & S. 580.
(*b*) 1 B. & A. 227.
(*c*) 3 B. & A. 330.
(*d*) 2 Bro. & Bingh. 619.
(*e*) 9 D. & R. 339; 6 B. & C. 351.

the present for negligence, but meant to confine it to what was done under the powers of that act, towards maintaining and improving the docks. Upon an attentive consideration, however, of the two dock acts, it appears to us, that if the second act had never passed, the protection given by s. 94 of the first act would have applied to any action which might have been brought for the injury in question; and that if this action is to be considered as founded on the second act, the re-enactment in the second act of what forms s. 94 of the first act, will also apply to it. By 50 *Geo.* 3, many powers are given for making and maintaining the docks, and no doubt the protection given by s. 94, would apply to any action which might be brought for an excess in the execution of those powers; but it does not follow that it would be confined to them. By s. 71, the company are to appoint a dock-master, who is to have power to direct the mooring, unmooring, moving and removing of all vessels into or being in the docks, &c. By s. 72, he is to have the control over the space of 100 yards from the entrance into the docks, so far as relates to the transporting vessels coming in or going out. It was from impropriety in the directions which the dock-master gave, and from the improper exercise of this control, that the injury in question happened. But was not the dock-master acting, in giving those directions and exercising that control, in pursuance of the act? It was only under the act that he had authority to give any directions; but for the act, the captain and crew of the vessel might have disregarded those directions. Supposing, then, that the 51 *Geo.* 3 had never passed, and that the case had stood upon the 50 *Geo.* 3, and that an action had been brought against the dock-master for the injury which his improper directions had occasioned, would he not have been entitled to the protection given by s. 94? Would he not have been entitled to say, "I acted under, and therefore, *in pursuance of the* statute. I should never have acted but for the statute. The statute made it my duty to act; and if I

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acted erroneously, I am entitled to the protection the statute meant to give to an honest but erroneous exercise of its powers."

Then, if in an action against the dock-master under 50 *Geo.* 3, s. 94 of that act would have applied to him, the argument which would deprive the company of the like protection when they are sued under 51 *Geo.* 3, fails. They are, under 51 *Geo.* 3, in at least as favourable a situation as the dock-master was under 50 *Geo.* 3, and what would have been a defence for him, will be also a defence for them. *Wallace* v. *Smith* (*a*) seems to us at least as strong a case as the present. There the ground of complaint was, that the West India Dock Company had wrongfully prevented the plaintiffs, as brokers or agents, from landing goods from vessels in the docks, and delivering them to the owners; and the question was, whether the 39 *Geo.* 3, c. 69, s. 185, which required fourteen days' notice before any action was brought against the company for any thing done *in pursuance* or under colour of that act, was a bar to the action, no notice having been given; and after taking time for consideration, the Court held that it was. The defendant's counsel immediately agreed to waive the advantage, and to refer the injury complained of to arbitration. In deciding this case, it is not necessary to go the length of *Sellick* v. *Smith* (*b*), which was cited at the bar, nor to say whether a mere nonfeasance would be *an act done* within the meaning of this and similar statutes; a point much doubted in *Blakemore* v. *The Glamorganshire Canal Company* (*c*). In the present case, the statute authorises the giving directions, and giving directions is doing an act. There must, therefore, be a nonsuit.

Judgment of nonsuit.

(*a*) 5 East, 115.
(*b*) 2 Carr. & Payne, 284.
(*c*) 3 Younge & J. 60.

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WISE v. METCALFE, Executor of METCALFE, deceased.

CASE by the plaintiff, rector of the church of the parish of Barley, in the county of Hertford, against the defendant, executor of the late rector, *William Metcalfe*, the immediate predecessor of the plaintiff, to recover the amount of the dilapidations of the rectory-house, barns, stables and out-houses thereto belonging, of the said rectory, and of the chancel of the said church, which had arisen at the time of the death of the said *William Metcalfe*. At the trial before *Garrow*, B., at the Herts summer assizes, 1828, a verdict was found for the plaintiff, damages 399*l.* 18*s.* 6*d.*, subject to the opinion of this Court upon the following case:—

The deceased, *William Metcalfe*, became rector of the church of the parish of Barley, in 1814, and soon afterwards received from the personal representative of his immediate predecessor the sum of 115*l.*, being the amount of the dilapidations of the rectory-house, out-buildings and chancel, at the death of his said predecessor. Mr. *Metcalfe* continued to be rector until his death, which happened on the 16th of May, 1827, at which period the annual value of the said rectory was 600*l.*, out of which the sum of 46*l.* was payable annually for land-tax. In the month of July, 1827, the plaintiff became the rector of the church of the said parish, and has so continued ever since. The rectory-house is an ancient structure, built with timber and plastered on the outside, and has upon it the date of 1624. The barns are also old, but not of equal age with the rectory-house. The dilapidations of the rectory-house, barns, stables, out-buildings, and of the chancel of the church, amounted to 399*l.* 18*s.* 6*d.*, provided the principle upon which the estimate had been made was correct. That principle was, that the former incumbent, *William Metcalfe*, ought to have left the rectory-house, buildings and chancel in good and substantial repair; the painting, pa-

The incumbent of a living is bound to keep the parsonage-house, buildings, and chancel in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement; but he is not bound to supply or maintain any thing in the nature of ornament, as painting (unless necessary to preserve exposed timber from decay) and whitewashing and papering: and in an action for dilapidations by the successor against the representative of a deceased rector, the damages are to be calculated upon this principle.

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pering and whitewashing being in proper decent condition for the immediate occupation and use of his successor; that such repairs were to be ascertained with reference to the state and character of the buildings which were to be restored where necessary, according to their original form, without addition or modern improvement. It was proved by the several surveyors of experience, examined on the part of the plaintiff, and also of the defendant, that they had invariably estimated the dilapidations between an incumbent of a living and the representatives of his predecessor upon the above principle.

If, however, the rectory-house, buildings and chancel were to be repaired in the same manner only as buildings ought to be left by an out-going lay tenant, who is bound by covenant to leave them in good and sufficient repair, order and condition, the expense of such reparations amounted to 310*l.*, the painting, papering and whitewashing not being included in the last estimate.

And if the former incumbent, *William Metcalfe*, was only bound to leave the rectory-house, buildings and chancel, wind and water tight, or in that state of reparation which an out-going lay tenant of premises, not obliged by covenant to do any repairs, ought to leave them in, then the expenses of repairing the rectory-house, buildings and chancel, amounted to 75*l.* 11*s.*

The question for the determination of the Court is, which of the above principles of valuation is the correct one; and according to their decision the damages will stand at 399*l.* 18*s.* 6*d.*, or be reduced either to 310*l.*, or to 75*l.* 11*s.*

Brodrick, for the plaintiff. The first principle of valuation stated in the case is the correct one, and according to that the plaintiff is entitled to retain his verdict for the full amount of damages given at the trial. The action for dilapidations is a branch of the common law; for it is founded on the custom of England, which is the common law. Now

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by that custom, as it will be found to be described in all the ancient authorities upon the subject, the incumbent of a living is bound to leave the premises in the same state of repairs as he is bound to keep them in. In *Degge* (*a*) the rule is thus laid down:—" Omnes et singuli prebendarii, rectores, vicarii regni Angliæ pro tempore existentes, omnes et singulas domos et edificia prebendarum, rectoriarum, et vicariarum suarum reparare et sustentare, et ea successoribus suis reparata et sustentata dimittere teneantur." That language clearly shews that the premises ought to be left to the successor in the same state of repairs in which they ought to be kept by the predecessor. In *Gibson's Codex* (*b*), there is given a legantine constitution of Cardinal *Othobon* (*c*), by which it is ordered that none through covetousness may neglect the house, nor suffer it to go into ruin or dilapidation. It is in these words:—" Improbam quorundam avaritiam prosequentes, qui cùm de suis ecclesiis et ecclesiasticis beneficiis multa bona suscipiant, domos ipsarum, et cætera edificia negligunt, ita ut integra ea non conservent et diruta non restaurent; propter quod ecclesiarum ipsarum statum deformitas occupat et multa incommoda subsequuntur: statuimus et præcipimus, ut universi clerici, suorum beneficiorum domos, et cætera edificia, prout indiguerint reficere studeant condecenter." *Lyndewode*, in his comment upon this constitution (*d*), particularly notices the term " prout indiguerint," and says, " necessariam refectionem importat; non ergo loquitur hic de refectione preciosæ picturæ Parrhasii vel Apellis, immo nec de aliis voluptuosis impensis." Still the term " studeant" implies that care is to be taken from time to time to keep the premises in decent and becoming repair. The word " dilapidations" means the neglect of such repairs as are necessary to make the house habitable—habitable, that is,

(*a*) Degge's Parson's Counsellor, p. 138, pl. 94.
(*b*) Gibs. Cod. Jus. Eccl. 751.
(*c*) A. D. 1268; 52 Hen. 3.
(*d*) Lyndewode's Provinciale. Constitutio Obothoni, tit. 17. De Domibus Ecclesiarum Reficiendis, p. 112, Ed. Oxon.

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with a reasonable degree of respectability and convenience —regard being had to the value of the benefice to which the house belongs. *Gibson*, in the appendix to the *Codex*(*a*), gives directions for parochial visitations, and enumerates among the things to be inspected, the mansion-house of the rector, and other houses and buildings thereto belonging, all of which, he says, ought to "be kept in good and sufficient repair; and particularly that the *mansion or dwelling-house* (over and above the repairs which are deemed *necessary*) be kept in such decent manner as is suitable to the condition of the rector, vicar or curate," and he refers to the words in the constitution of *Othobon*, "reficere studeant condecenter." In the present case the rector derived an income of 600*l.* a year from his rectory; surely then he ought to have devoted a portion of that income to the keeping the premises in repair, and in a state generally, with respect to painting, papering and whitewashing, suitable for the convenient occupation of a man of that income. In *Godolphin's Repertorium* it is said(*b*), that in the injunctions of King *Edward* the Sixth to all his clergy, it is required "that the proprietors, parsons, vicars and clerks, having churches, chapels, or mansions, shall *yearly* bestow upon the same mansions or chancels of their churches, being in decay, the fifth part of their benefices, till they be *fully* repaired, and the same so repaired shall always keep and maintain in good estate." That the executors of a deceased incumbent are liable by the common law for dilapidations, is clear upon all the authorities(*c*); though it is not so clear in what state the premises must be in order to make it necessary to put them into repair. The true principle, however, seems to be, that every incumbent ought to leave the premises in the same state of repair in which he is bound to keep them, that is, in a state fit for the occupation of a person holding such a benefice. The

(*a*) P. 1554.
(*b*) P. 176, ed. 1689.
(*c*) See Burn's Eccl. Law, 2, tit. Dilapidations; Watson's Clergyman's Law, p. 409; *Young* v. *Munsby*, 4 M. & S. 183.

case of *Percival* v. *Cooke* (*a*) will be relied upon by the other side. That was an action similar to the present, upon the trial of which *Best*, C. J. expressed his opinion, that the executors of a deceased incumbent are not bound to put the rectory-house into a finished state of repair; but are only bound to restore what is actually in decay, and to make such repairs as are absolutely necessary for the preservation of the premises. The parties in that case deferred to the learned judge's opinion and compromised the suit, so that there was no opportunity or occasion to discuss the propriety of the rule by him laid down; but it is not too much to observe that it is a mere nisi prius dictum, and as such entitled to little weight. An authority of quite as much weight might be cited in an opinion given by Lord *Stowell*, when at the bar, upon this subject, which goes all the length of the arguments used in behalf of the plaintiff in the present case, and which has been very generally acted upon by surveyors in estimating the amount of dilapidations (*b*). An incumbent may be compelled, under the

(*a*) 2 C. & P. 460.

(*b*) The following is a copy of the case laid before Sir *William Scott*, and of his opinion referred to in the text.

CASE.

"There being a difference of opinion between the Rector of *A.* in the county of York, and the executor of the late incumbent thereof, respecting the sense of the word 'dilapidations,' and a very wide difference, in consequence, between the estimates of the workmen employed by the same parties; Sir *William Scott* is desired to give the legal acceptation of the word 'dilapidations,' that is, whether it implies the same as, or more than, what is generally understood by the words 'complete repair,' in common tenancy; and if more, how far he thinks it extends beyond them."

OPINION.

"I am of opinion that 'dilapidations' go beyond what is generally understood of 'complete repairs' in common tenancy; at least, beyond what I understand by that expression. I understand by dilapidations, and I think I am fully supported by the decisions of competent Courts in understanding so, such repairs and renewals, and, if I may use the word, renovations, if necessary, of the house and its appendages, as will enable the incumbent to enter upon and inhabit them at the period the law entitles him to take possession, or as soon after as may be, allowing reasonable time for the repairs, &c. Dilapidations, therefore, will

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ecclesiastical law, not only to repair but to rebuild; Dr. *Wood's case* (*a*); where a bishop (*b*) was suspended for dilapidations, and the profits of his bishopric sequestered, until the episcopal palace was rebuilt out of them. So, the profits of a benefice may be sequestered by the ordinary, and applied in such repairs as the ecclesiastical law requires, or the incumbent visited with ecclesiastical censures, even to deprivation, if necessary (*c*). And the statute 57 *Geo.* 3, c. 99, requires non-resident incumbents to keep their houses in good and sufficient repair; and provides (*d*), that where curates are appointed by incumbents, and receive the entire profits of the benefice, they shall allow any sum not exceeding one-fourth of the profits that may have been expended in repairs.

Thesiger, contrà. It is immaterial to consider what has

include not only all repairs merely substantial, but likewise some of a more ornamental nature. The house must be in proper condition as to whitewashing and paint, because it cannot otherwise be decently inhabited.

"I do not mean that it is to be new whitewashed and painted, if the whitewashing and painting be fit for use; but if it is not so, the executor is bound to whitewash and paint it anew. I need not add, that the floors, ceilings and cornices must all be in good condition, as likewise windows, frames, doors and locks, and every part of the apparatus of a decent habitation. When I say in a good condition, I mean that each should be in a sound and proper condition fit for its respective use. Their being plain is no sufficient objection against them. It would be endless for me to particularize the articles to which 'dilapidations' applies; nor could I do it from mere memory, without having the several articles proposed to me with an inquiry upon each: but I may lay down the general principle to be this—that dilapidations are such repairs and renovations as are proper to make the house habitable with decent convenience, respect being had to the value of the benefice to which the house belongs.

"I take this to be the strict principle of law applying to dilapidations. I need not add, that in practice this principle ought not to be acted upon with a minute and sordid rigour, but ought to be moderated in the adjustment by a liberal disregard of things trifling in their own nature and value."

(*a*) Cited in 12 Mod. 237.

(*b*) Litchfield and Coventry.

(*c*) See Burn's Eccl. Law, 2, tit. Dilapidations, and the cases there collected.

(*d*) In section 63.

been the prevailing custom or practice in estimating dilapidations hitherto; the Court are now called upon to establish a legal principle upon which such estimates shall be made in future. Of the three principles stated in the case, the last is that upon which the estimate in the present instance ought to have been made, namely, that the incumbent is bound to leave the buildings belonging to his benefice in such a state of repair only, as an outgoing lay tenant, not bound by covenant to repair, ought to leave his premises in. Dilapidation may be almost called a synonymous term with waste. Damages are recoverable at law for dilapidations upon the same principle that they are recoverable for permissive waste. The definition of the word given by the best authorities fully supports this argument. *Cowell*, in his Dictionary, calls it "a wasteful spending or destroying, or the letting buildings run to ruin and decay for want of due reparation." *Degge*, in his *Parson's Counsellor* (*a*), calls it, "the pulling down or destroying, in any manner, any of the houses or buildings belonging to a spiritual living, or the chancel, or suffering them to run into ruin or decay, or wasting and destroying the woods of the church, or committing or suffering any wilful waste in or upon the inheritance of the church." (*b*) *Blackstone*, speaking of dilapidations, says (*c*), "It is also said to be good cause of deprivation, if the bishop, parson, vicar, or other ecclesiastical person, dilapidates the buildings, or cuts down timber growing on the patrimony of the church, unless for necessary repairs;"

(*a*) P. 134.

(*b*) Blackstone, in his Commentaries, iii. 91, calls it, "a kind of ecclesiastical waste, either voluntary by pulling down, or permissive by suffering the chancel, parsonage-house, and other buildings thereunto belonging, to decay." Johnson, in his Dictionary, calls it, "the incumbent's suffering the chancel or any other edifices of his ecclesiastical living, to go to ruin or decay, by neglecting to repair the same; and it likewise extends to his committing, or suffering to be committed, any wilful waste in or upon the glebe-woods, or any other inheritance of the church:" and he cites Ayliffe's Parergon as his authority. Chambers, in his Cyclopædia, calls it, "a wasteful destroying, or letting buildings, especially parsonage-houses, run to ruin and decay, for want of necessary reparation."

(*c*) 3 Bla. Comm. 91, 18th ed.

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and he cites 1 *Rol. Rep.* 86, 11 *Rep.* 98, and *Godbold*, 269, as authorities. And those cases are good authorities for his position. In *Stockman* v. *Wither*(*a*), the very point was so decided, and there waste and dilapidation were treated as synonymous terms. In *The Bishop of Salisbury's* case (*b*) it was held, that if a bishop, parson, or ecclesiastical person, do cut down trees upon the lands, unless it be for reparations of the ecclesiastical house, or do or suffer to be done any dilapidations, they may be punished for the same in the Ecclesiastical Court, and a prohibition will not lie, and the same is good cause of their deprivation of their ecclesiastical livings and dignities. But yet for such waste done, they may be punished also at common law, if the party will sue there. In *Liford's* case (*c*) it is said, if a bishop or archdeacon abates or fells all the wood he has, as bishop, he shall be deposed as dilapidator of his house. In other cases, prohibition has been resorted to, as a milder mode of restraining ecclesiastical persons from committing dilapidation or waste; *Knowle* v. *Harvey* (*d*), *The Bishop of Durham's* case (*e*); though in one case the Court of Common Pleas held that they had not power to award a prohibition: *Jefferson* v. *The Bishop of Durham* (*f*). In addition to the modes already noticed, of deprivation and prohibition, a third, namely, sequestration, seems to have been founded upon the constitution of Cardinal *Othobon* (*g*), cited on the other side. By that bishops and archdeacons are required to admonish their clerks decently to repair the houses and buildings of their benefices; and if they neglect for the space of two months, the bishop is to cause the same to be effectually done at the costs and charges of the clerk, out of the profits of the church and benefice, causing so much thereof to be received as may be sufficient for such reparation. Originally, the amount to be sequestered was in the discretion of the

(*a*) 1 Rol. Rep. 86.
(*b*) Godbolt, 259.
(*c*) 11 Rep. 49.
(*d*) 1 Rol. Rep. 335; 3 Bulstr. 158.
(*e*) Cited in *Liford's* case, 11 Rep. 49.
(*f*) 1 B. & P. 105.
(*g*) A.D. 1268, 52 Hen. 3, Gibs. Cod. 751.

ordinary, but by injunctions in the reigns of *Henry* 8, *Edward* 6, *and Elizabeth* (*a*), the amount was limited to one fifth, which was afterwards by the Reformatio Legum Ecclesiasticarum reduced to one seventh. This last mode of repairing dilapidations in the life-time of the incumbent still prevails, and the amount usually allowed by the Ecclesiastical Court is one fifth; *North* v. *Barker* (*b*). It is to be observed, that all these modes of proceeding, deprivation, prohibition, and sequestration, assume a species of waste as their foundation. Such was, and still in part is, the law respecting repairs done during the incumbency. The next step is to consider what provisions have been made with regard to dilapidations existing at the time of the resignation or decease of the incumbent. The first is a canon of *Edmund*, archbishop of Canterbury, in the reign of *Henry* 5, in these words:—"Si rector alicujus ecclesiæ decedens domos ecclesiæ reliquerit dirutas vel ruinosas, de bonis ejus ecclesiasticis, tanta portio deducatur quæ sufficiat ad reparandum hæc, et ad alios defectus ecclesiæ supplendos: *semper*, tamen, rationabilis consideratio sit habenda ad facultates ecclesiæ, cum hæc portio fuerit deducenda" (*c*). *Lyndewode's* gloss upon this Canon is—on the word "dirutas," "totaliter prostratas"—on "ruinosas," "de proximo vel verisimili casuras,"—on "ad reparandum," "et intellige hanc reparationem fieri debere, secundum indigentiam et qualitatem rei reparandæ, ut scilicet impensæ sint necessariæ *non* voluptuosæ,"—on "facultates ecclesiæ," secundum quarum considerationem hæc reparatio est facienda; quia in beneficio pinguiori requiruntur edificia magis sumptuosa, quam in beneficio minus pingui." This is the first authority touching the nature of the repairs, and it is observable that it expressly refers to the value of the living. At common law, probably, there always existed a remedy against the executor of a deceased rector, though *Gibson* (*d*)

(*a*) Gibs. Cod. 753, in notis.
(*b*) 1 Phill. Rep. 309.
(*c*) Lyndew. Prov. lib. iii. tit. 27, p. 250, ed. Oxon.
(*d*) Gibs. Cod. 753.

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mentions *Degge* as the first author who suggested the possibility of maintaining such an action in the common law Courts, and cites *Jones* v *Hill* (*a*) as the first instance of such an action being entertained. *Degge* gives the custom upon which the action is founded, in these words:—"Et si hujusmodi prebendarii, rectores, et vicarii domos et edificia hujusmodi, successoribus suis sic, ut præmittatur, reparata et sustentata, non demiserunt et deliquerunt; sed ea irreparata et dilapidata permiserunt, executores sive administratores bonorum et catallorum talium præbendariorum, rectorum, et vicariorum, post eorum mortem de bonis et catallis decedentium successoribus talium prebendariorum, rectorum, et vicariorum, tantam pecuniæ summam quantam pro necessariâ reparatione et edificatione hujusmodi domorum et edificiorum expendi aut solvi sufficiet, satisfacere teneantur" (*b*). This shews the measure of damages to be recovered against the executor, namely, so much only as is required to repair and sustain that which is out of repair and dilapidated, and which it is necessary should be repaired and sustained. Now that is the very principle of permissive waste. The foundation of this action is a tort, and it is an exception to the general rule of law, "Actio personalis cum personâ moritur." In *Sollers* v *Lawrence* (*c*), *Willes*, C. J. gives as a reason for the action being maintainable, "because it is not considered as a tort in the testator, but as a duty which he ought to have performed, and therefore his representatives, so far as he left assets, shall be equally liable as himself" (*d*). But "the action is in form an action on the case in tort, and could not possibly be framed in assumpsit, as on a contract, for the plaintiff must be the succeeding rector, who cannot be known until after the death of his predecessor, and of course could not contract with him" (*e*). Then as the action is founded on the breach of a duty cast by law upon the incumbent, it becomes ne-

(*a*) 3 Lev. 268.
(*b*) Degge's Pars. Couns. 138; and see 1 Lutw. 116.
(*c*) Willes, 413.
(*d*) Id. 421.
(*e*) 1 Saund. 216, note, last ed.

cessary to consider in what relation the incumbent stands to the benefice. Now he is considered as having the fee, when it is for the benefit of the church that he should be so considered; when otherwise, he is considered as tenant for life. He is in the condition of a tenant for life, with impeachment of waste, or like tenant for years, or from year to year, not bound by covenants. Such persons were not originally liable for waste at all, and though they have been made so liable by the Statute of Marlbridge, still that is to a limited extent only. It is quite clear that an outgoing lay tenant is not bound to do more than merely necessary repairs. In *Rolle's Abridgement* it is said (*a*), "if a tenant permit a chamber to be in decay for default of plastering, whereby the great timber becomes rotten, and the chamber becomes very foul and filthy, an action of waste lies." So, if the lessee permit the walls to be in decay for want of daubing, whereby the timber becomes rotten (*b*). *Ferguson* v.——(*c*), *Russell* v. *Smithies* (*d*), and *Horsfall* v. *Mather* (*e*), are all authorities shewing that the liability of a tenant, not bound by covenant, extends to necessary repairs only. No case can be found expressly defining the nature and extent of this liability in ecclesiastical persons. In *North* v. *Barker* (*f*), Sir *John Nichol* expressed himself of opinion that the executors of a deceased incumbent are not bound to renovate a building, even in its ancient form, much less in its pristine beauty, and that the thorough repair of the old building is not to fall on one incumbent. Assimilating the liability of an ecclesiastical person with that of a lay tenant for life or years, the rule laid down by *Best*, C. J. in *Percival* v. *Cooke* (*g*), appears by no means unreasonable. The statute 13 *Eliz.* c. 10, declares what dilapidations the executor of a deceased rector shall be liable to pay for. It recites, that persons endowed of buildings belonging to ec-

(*a*) II. 816, tit. Waste, pl. 36.
(*b*) Id. pl. 37.
(*c*) 2 Esp. 390.
(*d*) 1 Anstr. 69.
(*e*) Holt's N. P. C. 7.
(*f*) 3 Phill. Rep. 307.
(*g*) 2 C. & P. 460.

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clesiastical benefices had not only suffered the same, for want of due reparation, to run to decay, converting the timber, lead, and stones to their own benefit, but had also made deeds of gift and other conveyances of their goods and chattels in their livestime, to the intent, after their death, to defeat and defraud their successors of such just actions and remedies as otherwise they might have had for the same against their executors of their goods by the laws ecclesiastical: and then enacts, that if any incumbent of any ecclesiastical living, whereunto belonged any house, &c. which by law he was bound to repair, should thenceforth make any conveyance of his goods, to the intent above mentioned, his successor may have remedy in the Ecclesiastical Court against the person to whom such gift had been made, for the amendment and reparation of so much of the dilapidations and decays as hath happened by his fact or default, in such sort as he might have had if the donees were executors of the last incumbent. This confines the liability of the fraudulent donee to such dilapidations as happen by the fact or default of the incumbent. Now dilapidations occasioned by the hand of time, as the wear and tear of a house, cannot be said to happen by the fact or default of the incumbent; the words of the statute include no act which would not be waste in a tenant for life or for years: and if this is the measure of damages fixed by the statute to be paid by a fraudulent donee, it is a fair inference that the legislature intended to cast upon him the same burthen which the common law had already cast upon an incumbent who had been guilty of no fraud. Again, by the statute 17 *G.* 3, c. 53, the incumbent, where there is no house, or where the house is so ruinous and decayed that one year's produce of the living will not suffice to repair it, may have an estimate made, and, with the consent of the ordinary, borrow money to rebuild upon mortgage of the glebe, tithes, &c.; and the statute goes on to charge the living with the monies so raised, and to direct that all sums recovered by suit, or secured by composition of any former incumbent, shall be

applied in part of the payments under the estimate. Now, if the argument on behalf of the present plaintiff be correct, this statute can never apply, except in cases where the incumbent dies insolvent; for if his executor is to supply and restore whatever he leaves deficient or decayed, the house never can become ruinous or decayed, because if it should be destroyed by lightning or prostrated by tempest, it must be rebuilt by the incumbent under his common law obligation. Every incumbent is entitled to the fair use of all the property attached to his living, and should be allowed to deal with it in the same way as a prudent man having a perpetual interest would do. The property must be in a gradual course of decay; but if it be in such a state of preservation that the incumbent might fairly take another year's wear out of it, the mere circumstance of his dying in the course of that year ought not to throw upon his executor the burthen of repairing it sooner than the incumbent himself need have done; the succeeding rector will have his proportion of the profits, and should in justice bear his proportion of the expense.

Cur. adv. vult.

BAYLEY J. now delivered judgment.—This was an action for dilapidations, brought by the successor against the executor of the deceased rector, and the question was, by what rule the dilapidations as to the rectory-house, buildings and chancel, were to be estimated. Three rules were proposed for our consideration. First, that the predecessor ought to have left the premises in good and substantial repair, the painting, papering and whitewashing being in proper and decent condition for the immediate occupation and use of his successor, and that such repairs were to be ascertained with reference to the state and character of the buildings, which were to be restored, where necessary, according to their original form, without addition or modern improvement, and the estimate, according to this rule, came to 309*l.* 18*s.* 6*d.*

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The second rule proposed was, that they were to be left as an outgoing lay tenant ought to leave his buildings, where he is under covenant to leave them in good and sufficient repair, order and condition, and the estimate, by that rule, was 310*l.* the painting, papering and whitewashing not being included.

The third rule was, that they were to be left wind and water tight only, or, as the case expresses it, in such condition as an outgoing lay tenant, not obliged by covenant to do any repairs, ought to leave them, and by that rule the estimate would be 75*l.* 11*s.*

We are not prepared to say that either of these rules is precisely correct, though the second approaches the most nearly to that which we consider as the proper rule.

The law and custom of England, or, in other words, the common law, as stated in some of the earliest precedents, p. 12 and 13, *Henry* 8, *Rot.* 126, C. B., and others which we have searched, and in 1 *Lutw.* 116, is as follows:— "Omnes et singuli prebendarii, rectores, vicarii, &c., pro tempore existentes, omnes et singulas domos et edificia prebendariorum, rectoriarum, vicariarum, &c., *reparare et sustentare*, ac ea successoribus suis reparata et sustentata dimittere et relinquere teneantur, et si hujusmodi prebendarii, rectores, vicarii, &c., hujusmodi domos et edificia successoribus suis, ut præmittatur, reparata et sustentata non dimiserint et reliquerint, sed ea irreparata et dilapidata permiserint, eidem prebendarii, &c., in vitis suis, vel eorum executores, sive administratores, &c., post eorum mortem, successoribus prebendariorum, &c., tantam pecuniæ summam, quantam pro *reparatione, aut necessariâ re-edificatione* hujusmodi domorum et edificiorum expendi aut solvi sufficiet, satisfacere teneantur." An averment in terms nearly similar has been usually introduced into all declarations on this subject.

From this statement of the common law, two propositions may be deduced. First, that the incumbent is bound, not only to repair the buildings belonging to his benefice, but also to *restore* and *rebuild* them, if necessary. Secondly,

that he is bound only to *repair*, and to *sustain*, and to *rebuild*, when necessary. Both these rules are very reasonable, the first, because the revenues of the benefice are given as a provision, not for a clergyman *only*, but also for a suitable residence for that clergyman, and for the maintenance of the chancel: and if by natural decay, which, notwithstanding continual repair, must at last happen, the buildings perish, these revenues form the only fund out of which the means of replacing them can arise. The second rule is equally consistent with reason, in requiring that which is useful only, not that which is matter of ornament or luxury.

It seems naturally to follow, from the first of these propositions, that the third mode of computation proposed in the case cannot be the right one, because a tenant, not obliged by covenant to do repairs, is not bound to rebuild or replace. The landlord is the person who, when the subject of occupation perishes, is to provide a new one, if he thinks fit. And if the second proposition be right, a part of the charges contained in the first computation must be disallowed; for, papering, whitewashing, and such part of painting as is not required to preserve wood from decay, by exposure to the external air, are rather matters of ornament and luxury, than of utility and necessity.

The authorities which have been cited from the canon law, agree with that which we consider to be the rule of the common law.

The earliest provision on this subject is the provincial constitution of *Edmund*, archbishop of Canterbury, made A. D. 1236, 21 *Henry* 3. It is in the following terms:— "Si rector alicujus ecclesiæ decedens domos ecclesiæ reliquerit dirutas vel ruinosas; de bonis ejus ecclesiasticis tanta portio deducatur, quæ sufficiat ad reparandum hæc, et ad alios defectus ecclesiæ supplendos." That constitution, therefore, directs the repairing "domos ecclesiæ dirutas vel ruinosas." And *Lyndewode's* commentary upon the words "ad reparandum" is, "scilicet diruta vel ruinosa. Et intellige hanc reparationem fieri debere secundum indigentiam et qualitatem rei reparandæ; ut scilicet, im-

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pensæ sint necessariæ non voluptuosæ." The next authority cited from the canon law, was the following legantine constitution of *Othobon*, promulgated A. D. 1268, 52 *Henry* 3:—"Improbam quorundam avaritiam prosequentes, qui cum de suis ecclesiis et ecclesiasticis beneficiis multa bona suscipiant, domos ipsarum, et cætera edificia negligunt, ita ut integra ea non conservent, et diruta non restaurent." That is the imputation against the clergy. The constitution then proceeds:—"statuimus et præcipimus ut universi clerici suorum beneficiorum domos, et cætera edificia prout indiguerint reficere studeant condecenter, ad quod per episcopos suos vel archidiaconos sollicité moneantur. Cancellos etiam ecclesiæ per eos qui ad hoc tenentur refici faciant, ut superius est expressum. Archiepiscopos vero et episcopos, et alios inferiores prælatos, domos et edificia sua sarta tecta, et in statu suo conservare et tenere, sub divini judicii attestatione præcipimus, ut ipsi ea refici faciant, quæ refectione noverint indigere."

The statute 13 *Elizabeth*, c. 10, speaks of ecclesiastical persons suffering their buildings, for want of due reparation, partly to run to ruin and decay, *and in some part utterly to fall to the ground*, which, by law, they are bound to keep and maintain in repair; and makes the fraudulent donee of the goods of an incumbent liable for such dilapidation as hath happened by his fact and default. If the incumbent was bound by law to keep and maintain the dwelling-house in repair, any breach of his duty in that respect would be a default. The statute 57 *George* 3, c. 99, s. 14, enacts, that a non-resident spiritual person shall keep the house of residence in *good* and *sufficient* repair; and directs, that if it be out of repair, and remain so, the parson is to be liable to the penalties of non-residence, until it is put into *good* and *sufficient* repair, to the satisfaction of the bishop. There is nothing, either in the authorities cited from the canon law, or in these acts of parliament, to shew that the obligation of an incumbent to repair is other than that which I have already stated the common law cast upon him, namely, to sustain, repair, and rebuild, when necessary.

Upon the whole, therefore, we are of opinion that the incumbent was bound to maintain the parsonage, (which we must assume upon this case to have been suitable in point of size, and in other respects, to the benefice,) and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement; but that he was not bound to supply or maintain any thing in the nature of ornament, to which painting, (unless necessary to preserve exposed timbers from decay,) and whitewashing, and papering belong; and that the damages in this case should be estimated upon that footing. It will be found that this rule will correspond nearly with the second mode of computation, and probably will be the same as if the terms "order and condition" are meant, as they most likely are, not to include matters of ornament and luxury.

Judgment for the plaintiff.

It was afterwards referred to the master to calculate the damages upon this principle, and to report for what sum the judgment should be entered up; and he directed it to be for 369*l.* 18*s.* 6*d.*, for which sum the plaintiff ultimately had judgment.

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CASE for slander. The declaration stated, that the plaintiff, before the time of committing the grievances thereinafter mentioned, and from thence had been and still was a coach proprietor, and sold and disposed of cattle for divers persons for commission, and that he had never been suspected to be insolvent, or unable or unwilling to pay his just debts; that the defendant contriving, and wickedly and maliciously intending to injure the plaintiff, and to cause

A defendant cannot justify the repetition of slanderous words, by merely shewing that at the time when he repeated them, he stated that he had heard them from another, whom he named; he must also shew that he repeated them upon a justifiable occasion, and that he believed them to be true.

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it to be suspected and believed by his neighbours that the plaintiff was poor and in indigent and bad circumstances, and incapable of paying his just debts, and debts to be by him contracted, and thereby to injure him in his trade and business, falsely and maliciously spoke and published, in the presence and hearing of divers good and worthy subjects of this realm, of and concerning the plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, the false, scandalous, malicious and defamatory words following, that is to say:—"His (meaning the said plaintiff's) horses have been seized from the coach (meaning the said plaintiff's coach), on the road, he (meaning the said plaintiff) has been arrested, and the bailiffs are in his (meaning the said plaintiff's) house," thereby then and there meaning and intending that the said plaintiff was in bad and indigent circumstances, and incapable of paying his just debts. By means of the committing of which said grievances by the defendant, he the plaintiff was greatly injured in his good name, &c.; and also, by means of the premises, one *Morrison*, who before the committing of the said grievances was about to send, and otherwise would have sent, divers, to wit, eleven head of cattle to the plaintiff, for the purpose of being sold and disposed of by the plaintiff for *Morrison*, for commission and reward payable to the plaintiff in that behalf, to wit, on the day and year aforesaid, wholly refused and declined so to do, and thereby the plaintiff lost and was deprived of the commission which would have been payable by *Morrison* to the plaintiff. Plea, that before the speaking and publishing of the several words in the declaration mentioned, and therein supposed to have been spoken and published by the said defendant, of and concerning the said plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, to wit, on &c., at &c., one *T. W. Woor*, of Swaffham, in the county of Norfolk, spoke and published the following words to the defendant, of and concerning the plaintiff, and of and concerning and relating to him in his trade or busi-

ness of a coach proprietor, that is to say:—"His (meaning the said plaintiff's) horses have been seized from the coach (meaning the plaintiff's coach) on the road; he has been arrested, and the bailiffs are in his house;" thereby then and there meaning that the plaintiff was in bad and indigent circumstances, and incapable of paying his just debts. And the defendant further saith, that at the time of speaking and publishing the said several words in the declaration as therein mentioned, he the defendant also declared, in the presence and hearing of the same persons in whose presence and hearing the said words were so spoken by him the defendant, that he had heard and been told the same from and by the said *T. W. Woor*, of Swaffham, in the county of Norfolk; wherefore, he the defendant, at the said time when &c., in the said declaration mentioned, did speak and publish, of and concerning the plaintiff, the said several words in the said declaration mentioned, as he lawfully might for the cause aforesaid. General demurrer to the plea, and joinder in demurrer.

F. Kelly, in support of the demurrer, was stopped by the Court.

Platt, in support of the plea. It is a good plea to a declaration for slander originally uttered by a third person, that the defendant mentioned the name of that person at the time he repeated the slander. It is said in the fourth resolution in Lord *Northampton's* case (*a*), "In a private action for slander of a common person, if *J. S.* publish that he hath heard *J. N.* say that *J. G.* was a traitor or thief; in an action on the case, if the truth be such, he may justify. But if *J. S.* publish that he hath heard generally, without a certain author, that *J. G.* was a traitor or thief, there an action sur le case lieth against *J. S.*, for this, that he hath not given to the party grieved any cause of action against

(*a*) 12 Rep. 134.

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any, but against himself, who published the words, although that in truth he might hear them; for otherwise this might tend to great slander of an innocent." [*Parke* J. But this plea does not come within the terms of that resolution. That resolution requires that the party repeating the slander shall give the party slandered a complete cause of action against the original author. That is not done here. This plea does not shew that the words were spoken by *Woor* under circumstances which would give the plaintiff any cause of action against him. It does not aver that *Woor* spoke the words falsely and maliciously. It does not shew, therefore, that the plaintiff has any cause of action against *Woor*.] If the words were false, it is submitted that the plaintiff has a cause of action against *Woor*; if true, he has no claim to a cause of action against either party. It is not necessary in an action for words to allege malice; if the words are actionable, the law implies malice: *Mercer* v. *Sparks* (*a*). [*Parke* J. That was after verdict, and malice must have been proved at the trial.] In Lady *Morrison* v. *Cade* (*b*), the report is this:—"Action for words: Whereas she was a widow, and in communication with the Earl of *Kent* about her marriage. That the defendant said, *Askot* had reported that he had had the use of her body (inuendo that he had had carnal copulation with her), ubi revera he never made any such report." "And it was moved in arrest of judgment, that the words were not actionable; for the first words may have a good intendment, as a physician may have the use of her body, &c. And the inuendo cannot alter the words: sed non allocatur; for the words in themselves cannot have any reasonable construction, and they shall be taken according to the usual and common sense of them, which is very slanderous to a lady of such reputation: Wherefore it was adjudged for the plaintiff. And this judgment was afterwards affirmed in a writ of error." [*Parke* J. It is alleged there that *Askot*

(*a*) Owen, 51; Noy, 35. (*b*) Cro. Jac. 162.

never made any such report, which is equivalent to an allegation that the defendant spoke the words falsely.] In *Lewis* v. *Walter* (*a*), it was held that the report of the speech of another, who never used such words, is actionable. [*Bayley*, J. The plea ought to confess and avoid the cause of action stated in the declaration. The charge in the declaration is, that the defendant spoke words amounting to an unqualified assertion. The answer in the plea is, that *Woor* first spoke the words, and that the defendant afterwards repeated them, adding, that he had heard and been told those words from and by *Woor*. So that, according to the plea, the defendant first made the assertion as of his own knowledge and authority, and then qualified it by alleging that he had previously heard it from *Woor*. The plea, therefore, does not confess and avoid the cause of action stated in the declaration.] It clearly confesses the cause of action, by shewing that the defendant spoke the words charged in the declaration, and, it is submitted, it then avoids it, by shewing that he named the person from whom he heard the words. The principle upon which the naming of the first publisher of a libel constitutes a defence is, that the defendant thereby negatives malice. In *Davis* v. *Lewis* (*b*) it was held, that it is no justification to an action for slander to plead that such an one told the slander to the defendant; but, that if the person repeating the slander at the same time mentions the name of the person from whom he heard it, that may be pleaded in justification to an action brought against the former. The present is the very case there put, which supports the fourth resolution in Lord *Northampton's* case (*c*), which was there spoken of by Lord *Kenyon* without disapprobation. A defendant cannot justify the repeating a report which he knows to be false, by shewing that he heard it from others, *Maitland* v. *Goldney* (*d*); from which it

(*a*) Cro. Jac. 406.
(*b*) 7 T. R. 17.
(*c*) 12 Rep. 134.
(*d*) 2 East, 426.

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would appear that if he had not known it to be false, the hearing it from others would have been a justification. The same rule is laid down, without any qualification, in *Rolle's Abridgement* (*a*). The decision in *De Crespigny* v. *Wellesley* (*b*), that it is no justification for the publishing of a libel, that, at the time of publishing it, the name of the person who communicated it to the defendant was also published, applies only to cases of written slander. There is a material distinction between written and oral slander, *Maitland* v. *Goldney* (*c*), where it is said, "Quære, whether a defendant can, by naming the original author, justify the publishing in *writing* slanderous words *spoken* by such other; especially after knowing that they were unfounded?" There are many instances where an action may be maintained for written slander, which could not be maintained if it were spoken.

BAYLEY, J.—I am clearly of opinion that this plea is bad. The declaration charges, &c. (Here his lordship stated the declaration as set out at the commencement of this case). Now, that imputes to the defendant an unqualified assertion; and if he had pleaded the general issue only, it would have been necessary for the plaintiff to have proved that the defendant in fact made such an unqualified assertion: and if he had failed in that proof, and had proved only that the defendant said that *Woor* had told him that the plaintiff had been arrested, &c., the defendant would have been entitled to a verdict or a nonsuit. The defendant, however, has pleaded specially; it was, therefore, his duty, according to the first principles of pleading, to confess the charge which he undertook to answer, and then to aver some matter amounting to an answer. The charge is, that the defendant made an unqualified assertion that the plaintiff had been arrested, &c. Unless the plea, therefore, contains an admission that the defendant spoke words bear-

(*a*) P. 46. pl. 3. (*b*) 5 Bingh. 392. (*c*) 2 East, 426.

ing that unqualified meaning, it is bad. Now the plea does not admit that the defendant spoke the words in an unqualified sense; therefore it is bad because it does not confess the charge stated in the declaration. Another objection pointed out by my brother *Parke* is, that the plea does not give the plaintiff any cause of action against *Woor;* and that, even according to *Lord Northampton's case* (*a*) a person, in order to justify the repetition of slander by naming the original author, must give the party slandered a cause of action against the party he so names. Now this plea merely states that the words were spoken by *Woor;* it does not state that they were spoken falsely and maliciously. For all that appears, they may have been spoken by *Woor* upon a justifiable occasion,—as by way of a confidential communication to a creditor, or in a court of justice. *Woor* may upon some occasion have been examined as a witness, and the words may have been extracted from him upon cross-examination. Assuming, therefore, that the defendant might rely upon the fact of his having heard the words first spoken by *Woor,* and having named him at the time when he repeated them, as an answer to the action, still he ought to have shewn by his plea that the words were spoken by *Woor* under circumstances which did not justify the speaking of them.

Upon the general question,—whether it is a good defence to an action for verbal slander, to shew that the defendant heard it from another, and named the author at the time,—I am of opinion that it is not. It has been already very properly decided that such evidence is no defence to an action for *written* slander (*b*); and I am of opinion that the rule ought to be extended to cases of *verbal* slander. It is true that in *Davis* v. *Lewis* (*c*), *Lord Northampton's case* (*d*) was alluded to without disapprobation by Lord *Kenyon,* a

(*a*) 12 Co. Rep. 134 a, in the Star Chamber, fourth resolution.

(*b*) In *De Crespigny* v. *Wellesley,* (5 Bingh. 392, and 2 Moore & Payne, 695,) where all the authorities upon the subject are collected.

(*c*) 7 T.R. 17.

(*d*) 12 Rep. 132.

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man of powerful mind, acute discrimination, and deep learning. But much as I respect the memory of that noble and learned judge, I cannot carry my respect so far as to surrender my own judgment to his. Let us examine the terms of the resolution, and try it by the simple test of reason and common sense. "It was resolved that if *A.* say to *B.*, did you not hear that *C.* is guilty of treason, &c.? this is tantamount to a scandalous publication; and in a private action for slander of a common person, if *J. S.* publish that he hath heard *J. N.* say that *J. G.* was a traitor or thief; in an action on the case, if the truth be such, he may justify." Now, assuming that it is not there stated, as a *qualified* proposition,—that a person may justify if he *believes* the slander to be true, and repeats it on a *justifiable* occasion,—but as a general proposition, that if he in fact heard the report from another, and named that other at the time he repeated the slander, that is *in all cases* a justification: I think that is a proposition which cannot be supported. I very much doubt whether the repetition of slander is justifiable in any case, unless the party really believes it to be true. A person who repeats slander, even though he states at the time that he heard it from another, gives it a certain degree of credit; for the mere act of repetition imports a degree of belief in the truth of the slander. It seems to me, therefore, that a person cannot be justified in repeating slander, unless he really believes it to be true. But I think that is not enough. I think it must be repeated *upon a justifiable occasion.* Every publication of slanderous matter is, primâ facie, a violation of the right which every person possesses in his character and reputation. The law, upon grounds of public policy and convenience, allows, under certain circumstances, the publication of slanderous matter, although it may be injurious to a particular individual. But the act being primâ facie unlawful, it properly lies upon the person charged with uttering slander, whether he be the original utterer or not, to shew that he uttered it upon some lawful occasion. Upon the whole, I am of opinion that a man

cannot by law justify the repetition of slander by merely naming the person who first uttered it; he must *also* shew that he repeated it on a *justifiable* occasion, and that he *believed* it to be true. Upon this view of the law, the plea in this case is bad, and the plaintiff is entitled to judgment.

LITTLEDALE, J.—For the reasons stated by my brother *Bayley*, I agree that this plea is bad; and upon that part of the subject I do not feel it necessary to add any thing; but with reference to the fourth resolution in *Lord Northampton's case* (*a*), I think it right to make a few observations. That resolution has been frequently referred to during the last thirty or forty years, and though never expressly overruled, has been generally disapproved of. The latter branch of it is extra-judicial, for it was not necessary to come to any resolution respecting private slander in the Star Chamber. It is in some degree inconsistent with the third resolution in the same case, which lays down, "that if one hear false and horrible rumours, either of the king, or of any of the grandees, it is not lawful for him to relate to others that he heard *J. S.* say such false and horrible words, for if it should be lawful, by this means *they may be published generally.*" Now the inconvenience there pointed out, namely, the general publication of slander, though differing in degree, would follow from the repetition of slander in every case, whether of king, lords, or commons; therefore the distinction taken in the two resolutions seems to involve some inconsistency. Perhaps, however, the fourth resolution may be considered as not going the length of saying, in terms, that a defendant may justify the repetition of slander generally, but only that he may justify under certain circumstances. If it must be taken as importing that a defendant may justify the repetition of slander generally, by merely shewing that he named the original author, I am of opinion that it is not law.

A brief consideration of the form of the record, and the

(*a*) 12 Co. Rep. 134 a.

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nature of the evidence proper to an action for slander, will, I think, prove this opinion well founded. The declaration, which is a technical statement of the facts necessary to support the action, alleges that the defendant falsely and maliciously uttered the slander, to the plaintiff's damage. In order to support that statement, there must, in general, be proof of malice in the defendant, of damage to the plaintiff, and that the words are untrue. Where, indeed, words falsely and maliciously spoken, as in this case, are actionable in themselves, the law presumes a damage; in other cases, an actual damage must be proved. Such an action can only be answered,—where the publication of the slander is not intended to be denied,—by the defendant's refuting the charge of malice, or shewing that the plaintiff is not entitled to recover damages. The charge of malice may be refuted, under the plea of the general issue, by shewing that the words were spoken upon an occasion, or under circumstances, which the law, upon the grounds of public policy, allows,—as in a parliamentary or judicial proceeding, or in giving the character of a servant. Where the truth of the words is relied upon as a defence to the action, the defendant must plead that matter specially; and for this reason, that the truth is an answer to the action, not because it negatives the charge of malice, (for slanderous matter, though true, may be uttered wrongfully and maliciously, so as to render the utterer liable to an indictment,) but because it shews that the plaintiff is not entitled to recover damages: for the law does not allow a man to recover damages for an injury to a character which he either does not possess, or does not deserve. Now a defendant, by shewing that, at the time when he published slanderous matter of a plaintiff, he stated that he had previously heard it from another, whom he named, does not negative the charge of malice, for one person may wrongfully and maliciously repeat that which another may have uttered upon a justifiable occasion. Such a plea does not shew that the slander was published upon an occasion, or under circumstances which the law, on

grounds of public policy, allows; nor, that the plaintiff has not sustained an injury, or is not entitled to recover damages. As much mischief may be done by the wrongful repetition of a slanderous tale, as by its original publication; for the first utterer may have been a person insane, or of bad character. Every person who repeats a slander gives it some additional weight and credit. A plaintiff is not the less entitled to recover damages for slanderous matter published concerning him, because another person previously published it. That shews, not that the plaintiff is a man of such conduct or character as deprives him of the right to recover damages, but that he has been wronged by another person as well as the defendant; and that he may, consequently, if the slander was not published by the first utterer upon a lawful occasion, have a good cause of action against that person as well as the defendant. It seems to me, therefore, that such a plea is not an answer to an action for slander, because it does not negative the charge of malice, and does not shew that the plaintiff is not entitled to recover damages.

PARKE, J.—It is not necessary, in disposing of this case, to decide whether the latter part of the resolution, so often alluded to, is good law or not; because, assuming it to be good, this plea is bad, for two reasons. To be a good plea it must confess and avoid the cause of action stated in the declaration. This plea either does not *confess*, or if it confesses, does not *avoid*, that cause of action. It appears from the case of *Bell* v. *Byrne* (*a*), that if a defendant has not made an assertion as his own, but has merely alleged that some other person had made it, it must be so averred: and that an averment in a declaration, that the defendant used slanderous words, must be taken to mean that he used them as his own words, and as a substantive allegation of his own; and will not be supported by proof that he used them as the words of another person. Applying the principle of that decision to the present case, if the plea be understood to confess that the words were spoken as those of another person, and

(*a*) 13 East, 554.

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not as a direct assertion of the defendant himself, it does not properly *confess* the charge made in the declaration; if, on the other hand, the plea be considered as confessing the words to have been used as those of the defendant himself, and as a substantive allegation of his own, it does not contain any proper *avoidance* of the matter so confessed: for if one man makes such an assertion of slander as his own, it can be no answer, even admitting the latter part of the fourth resolution in *Lord Northampton's case* to be law, if in the same conversation he *adds* that another man has *also* said the same thing. Secondly, the plea is bad, because it does not give the plaintiff any cause of action against *Woor*. It does not allege that *Woor* spoke the words falsely and maliciously; and though malice may be implied of words actionable in themselves, still the defendant ought to have stated in his plea, (as it must have been stated in a declaration against *Woor*,) that *Woor* spoke the words falsely and maliciously.

But assuming that the plea was not bad for the reasons I have mentioned, I am clearly of opinion that the latter part of the fourth resolution in *Lord Northampton's case* is *not* law. The twelfth part of the Reports was never much looked up to as a book of authority. Mr. *Hargrave* (*a*) deems it of small authority, being not only posthumous, but apparently nothing more than a collection from papers neither digested nor intended for the press by the writer (*b*). Mr. Serjeant *Hill*, in his copy, refers to folios 18 and 19 (*c*), as shewing that the twelfth part is not fit to be allowed. Mr. Justice *Holroyd*, in *Lewis* v. *Walter* (*d*), gives an opinion unfavourable to its accuracy. Besides, the language of the resolution itself is equivocal. It does not say, in direct terms, that if the defendant gives a cause of action against another, it will be in all cases an answer to an action for slander; and if it is to be understood as importing generally

(*a*) 11 St. Tr. 30.

(*b*) It is observable, that 12 Rep. was printed in 1658 in *English*, whereas the previous parts were printed early in the reign of *James* 1, in *French*.

(*c*) Case of *Non Obstante*.

(*d*) 4 Barn. & Alders. 614.

that the repetition of slander is lawful, provided the party at the time he repeats it mentions the name of the author, I think that upon no principle can such a proposition be supported, and I see no satisfactory distinction, in this respect, between oral and written slander. A man's reputation is entitled to the protection of the law against those slanders which it deems injurious; and as every one who publishes such slander injures that reputation, he is guilty of a wrongful act, and is, upon principle, liable in a civil action for any damage arising to another from that wrongful act. Lord Chief Justice *Best*, in *De Crespigny* v. *Wellesley*, says, "because one man does an unlawful act to any person, another is not to be permitted to do a similar act to the same person; wrong is not to be justified, or even excused, by wrong" (*a*): and I entirely agree with the sentiment. Every repetition of slander is a wrong done, for which an action lies; and the repeating of a slander cannot be less a wrong because the person who repeats it is not the same who first uttered it. The degree of injury may vary greatly, according to the character and condition of the individual who utters the slander, and the number and character of the persons in whose hearing it is uttered. The original utterer may have been a person of bad character, or may have uttered it when in a state of intoxication (*b*). Slander uttered by such a person, or under such circumstances, would find little credit; but if a person of good character, and in a sound state of mind, were afterwards to repeat that slander, he would thereby not only circulate it more widely, but he would give it credit by his repetition of it, even though he stated at the time that he heard it from another. Every wrong to *property* is the subject of a civil action, and upon what principle can it be said that every wrong done to a man's *reputation* is not equally so? A wrong to property cannot be justified by shewing that another person has previously committed a similar wrong, and why should it be otherwise in the case of a wrong to reputation? In this case, moreover, the plaintiff alleges

(*a*) 5 Bingh. 404. (*b*) 12 Co. Rep. 134 a.

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that in consequence of the words spoken by the defendant he sustained a special damage, by the loss of a customer, and non constat that any such special damage would have accrued from the original uttering of the words, if they had not been repeated by the defendant. In every point of view, therefore, it is clear that the plea is bad.

Judgment for the plaintiff (*a*).

(*a*) See *Maitland* v. *Goldney*, 2 East, 426; *Woolnoth* v. *Meadows*, 5 East, 463, and 2 Smith, 28; *Lane* v. *Howman*, 1 Price, 76; *Mills* v. *Spencer*, Holt, N. P. C. 533; *Saunders* v. *Mills*, 6 Bingh. 213, and 3 Moore & P. 520.

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A private book kept by a deceased collector of taxes, not as a matter of duty, but for his own convenience, containing entries by him, acknowledging the receipt of sums of money in his character of collector, is admissible evidence in an action against his surety,—although the parties who had made the payments were alive, and might have been called as witnesses.

DEBT on bond. The declaration stated that the defendant, in the life-time of *Thomas Squire*, deceased, (who was the collector for the Second Part of the Bishop's Liberty, appointed by the commissioners acting for the Second Division of East Brixton, in the county of Surrey, in execution of certain acts of parliament, passed in the 43d, 48th, 52d, and 59th years of *Geo.* 3, and the 1st, 2d, and 3d years of *Geo.* 4, relating to the duties under the management of the commissioners for taxes,) on the 10th of October, 1825, as surety for *Squire*, as collector of taxes, by his certain writing obligatory, became bound to the plaintiffs in the sum of 3226*l.*, being a sum equal to the amount of the whole duty and sums of money (including compositions under the act of 3 *Geo.* 4) assessed, and to be collected by *Squire* as such collector, and that the bond was subject to a condition; which condition, after reciting that *Squire* had been appointed collector of the rates and duties granted by the above-mentioned acts of parliament, and that one of the duplicates of assessment and of the abstracts of such of the said rates and duties as had been compounded for under the act of 59 *Geo.* 3, had been delivered to *Squire* with warrants for

collecting the same, and that *Squire* had been required by the plaintiffs to give security in pursuance of the first-mentioned act of 43 *Geo.* 3,—was, that if *Squire*, and the defendant, and one *Frost*, or either of them, should pay, in pursuance of the directions of the said statutes, all such sums of money assessed and to be collected in the said Second Part of the Bishop's Liberty, by *Squire* as such collector; and if *Squire* should duly enforce the powers of such acts against such as should make default,—then the bond was to be void, otherwise to remain in full force. Breach: that *Squire* collected large sums of money on account of the rates and duties granted by the said several acts of parliament, but that *Squire*, *Frost*, and the defendant, in the life-time of *Squire*, had not paid, nor had *Frost*, or the defendant, since the death of *Squire*, paid the said sums of money collected by *Squire*, or any part thereof. Plea: that *Squire* in his life-time paid the sums collected by him. The replication denied the payment.

At the trial before *Alexander*, C. B., at the last Kingston assizes, the case on the part of the plaintiffs was this:—

A duplicate assessment was delivered by the commissioners for taxes to *Squire*, in which he occasionally made entries of the sums received from the persons assessed. From the entries *there* made, it did not appear that *Squire* had received any moneys which he had not paid over to the commissioners. It did appear, however, that for his own convenience he kept a private book, containing entries (which were apparently copied from the duplicate assessment) of the names of the persons, and of the sums in which they were respectively assessed, and that it was his usual habit to collect by that private book, and to mark with ticks all the sums he received from the several persons therein mentioned. This book was inspected by two persons on the day after *Squire*'s death. They stated that they found in it entries with ticks against them, denoting the sums received from the persons against whose names those ticks were placed, for which there were not corresponding entries in the du-

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plicate assessment. It was proved that this private book had been delivered by *Squire's* daughter to the defendant, and that the defendant had had notice to produce it. The sums which appeared to be due from *Squire*, by the entries he had himself made in the private book, over and above what appeared by the duplicate assessment to have been collected by him, amounted to 99*l.* For some of those sums the plaintiffs further produced receipts given to several persons for taxes paid to *Squire*, and signed by him. On the part of the defendant it was objected that the receipts were not admissible in evidence, because the parties who paid the money might have been called; and that although entries made by *Squire* in any book which he, in the course of his duty as collector, was bound to keep, would be evidence against the surety, still entries made by him in a private book, kept for his own convenience, were not receivable in evidence to charge the surety. The Lord Chief Baron received the evidence, reserving to the defendant liberty to move to enter a nonsuit, if the Court should be of opinion that neither the receipts nor the entries in the private book were evidence; or to reduce the verdict to a proper proportionate amount, if they should be of opinion that the entries in the private book were not admissible in evidence, but that the receipts were. A verdict was thereupon found for the plaintiff, and damages were assessed upon the breach assigned in the declaration at 99*l.*, the full amount claimed.

In Easter term, 1829, a rule nisi was granted, pursuant to the liberty reserved for that purpose, against which

Andrews, Serjt. and *Hutchinson* now shewed cause. The entries made by *Squire*, the deceased collector, in his private book, were, in effect, declarations made by him against his own interest; for by means of them he charged himself with the receipt of various sums of money, which he was liable in point of law to pay over to other persons. As such, the entries would clearly have been admissible in evidence against *Squire*, the principal; and as the defendant,

when he became his surety, undertook that *Squire* should faithfully perform his duty, he was bound to know and must be presumed to have known in what manner *Squire* kept his accounts, and to have been aware of the existence and contents of the book; and if so, the entries in that book were equally admissible in evidence against the defendant, the surety. Upon the same principle the receipts also were admissible in evidence against the defendant; the plaintiff was not bound to call as witnesses all the persons who had made payments to *Squire*. It however seems unnecessary to labour this point, for if the entries in the book were evidence, they were sufficient to entitle the plaintiff to a verdict for the full amount of damages given by the jury.

Spankie, Serjt. and *Chitty*, contrà. First, the entries made by *Squire* in his private book, were not evidence against the defendant as his surety. If they had been made by *Squire* in the regular and necessary discharge of that duty for the faithful performance of which the defendant had become surety, it seems that they would have been evidence against the latter; *Goss* v. *Watlington* (*a*), *Whitnash* v. *George* (*b*); but that was not the case, for these entries were made in a private book kept by *Squire* for his own convenience only, and which he was not under any obligation, in the discharge of his duty as collector, to keep. It is true that the defendant, when he became surety, undertook that *Squire* should faithfully perform his duty; but it was no part of that duty to keep the book in which these entries appeared. *Squire*'s duty consisted in making entries in the public book, on the duplicate assessment, of all sums of money which he received as the collector; and such entries would clearly have been evidence against his surety; but where no such entries appeared in the public book, the presumption was that no money had been received. The

(*a*) 3 Bro. & Bingh. 132; 6 B. Moore, 355.

(*b*) 8 Barn. & Cressw. 556; *S. C. per nom. Whitmash* v. *Genge*, *ante*, iii. 42. And see *Stothert* v. *Goodfellow*, 1 Nev. & Man. 202, 204, (*a*).

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entries in the public book did not shew that *Squire* had received any money which he had not paid over. Entries made by a principal, privately and gratuitously, for his own convenience, may be evidence against himself, but cannot be received to charge his surety. They are not the best evidence; and the best evidence must be adduced in order to charge a surety. An express admission by a principal is not, in his life-time, sufficient to charge a surety; *Cutler* v. *Newlin* (*a*). In *Goss* v. *Watlington* (*b*), the entries were held admissible upon the ground that the book in which they were made was a public book, and one which it was the duty of the principal to keep and make entries in. In *Whitnash* v. *George* (*c*), the entries were admitted, not altogether as entries made by the principal against his own interest, but because they were made in accounts which it was his duty to keep, and which the surety had contracted he should keep faithfully (*d*). In the case of a guarantee, it has been held, that on a guarantee to pay for goods sold and delivered to a third person, the admission of such third person that he has received the goods, is not evidence to charge the guaranteeing party; the delivery of the goods must be proved; *Evans* v. *Beattie* (*e*). There seems to be no case in which it has been held that the mere admission of a principal is evidence to charge a surety even after the death of the principal. The book in this case was a mere copy of the duplicate assessment; and the only evidence to charge the defendant consisted of certain ticks made by *Squire* in that book. That was extremely loose and uncertain evidence, such as it would be highly dangerous to act upon. The ticks by no means certainly indicated that the sums to which they were annexed had been paid; they may have been made by *Squire* as indicating only that he expected that such sums would be paid; they may even have been made

(*a*) Manning's Digest, 2d ed. 137.

(*b*) 3 Bro. & Bingh. 132; 6 B. Moore, 355.

(*c*) 8 B. & C. 556; *ante*, iii. 42.

(*d*) See 2 Stark. Ev. 777.

(*e*) 5 Esp. N. P. C. 26. And see *Bacon* v. *Chesney*, 1 Stark. N. P. C. 192.

to indicate that such sums were in arrear, and required collection.

Secondly, the *receipts* were not admissible in evidence against the defendant. They were not sufficiently explained to render them admissible as evidence at all. It did not appear whence they came. The parties who made the payments ought to have been called as witnesses to prove the fact. That was the best evidence; and no supposed inconvenience can control the rule of law which requires its production. Besides, the bond in this case was given in conformity with the provisions of an act of parliament. Now, if the commissioners had done their duty under that act, (as the surety had a right to presume they had,) no default could have been made by *Squire;* for they are required to call the collectors before them, and to examine them upon oath as to the moneys collected by them. If that course had been pursued, no difficulty could have arisen.

BAYLEY, J.—The question in this case is, whether the contents of a private book, kept by a collector of taxes, (being entries whereby he purports to acknowledge the receipt, in his character of collector, of certain sums of money,) can be received in evidence against a surety, the collector having been appointed to collect the taxes mentioned in the bond executed by him as principal, and by the defendant as surety, pursuant to the provisions of an act of parliament. *Squire,* the deceased, was the collector, and after his death the book in question was found by his daughter, and was by her delivered to the defendant. There was, therefore, evidence to shew that the book when last seen was in the defendant's possession, and he having failed to produce it at the trial, after notice so to do, secondary evidence of its contents was admissible, if the book itself would have been so. It was proved that *Squire* was in the habit of collecting the taxes by this private book, and of marking with ticks the sums which he received, and that these ticks were used by him to denote that he had

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received those sums. There was also a question whether certain receipts were admissible in evidence; but as the entries in the book, if they were admissible to shew that *Squire* had received those sums, will be sufficient to entitle the plaintiff to retain the verdict for the full amount, that second question will not necessarily arise. It was contended on the part of the defendant, that the entries in the book were not receivable in evidence against him, upon the ground that it was a *private* book which it was not the duty of *Squire* in his character of collector to keep, and which he kept merely for private purposes; and it was said that the decisions in *Goss* v. *Watlington* (*a*) and *Whitnash* v. *George* (*b*), proceeded on the ground that the entries in those cases were in books which it was the *duty* of the principal, by the very terms of the bond, to keep, and to keep faithfully. The principle laid down in those cases was quite sufficient to support the decisions. But as the book in which the entries in the present case were made, was one which the collector was not, as such, bound to keep, it becomes necessary to inquire whether the rule established in those cases may not safely and properly be further extended; and whether the entries made in this private book may not be evidence against this defendant, considering him as a stranger, and without reference to his character of surety, in respect of which he may be identified in interest with his principal: and the question then will be, whether such entries, made by an individual against his own interest, may not be evidence, against a third person, of the fact of the receipt of the money. Now, it is a general and well-established rule of evidence, that declarations or statements of deceased persons are admissible where they appear to have been made against their own interest. Thus, an entry in a book, by which the person making it charges himself with the receipt of money on account of a third person, or acknowledges the payment of

(*a*) 3 Bro. & Bingh. 132, and 6 B. Moore, 355.
(*b*) *Ante*, iii. 42; 8 B. & C. 556.

money due to himself, has been held good evidence of the receipt or payment of such money. The case of *Warren* v. *Greenville* (*a*) is an early authority upon this subject, and does not appear to have been considered in the case of *Goss* v. *Watlington* (*b*). There, upon a trial at bar in 1740, the lessor of the plaintiff claimed under an old entail in a family settlement, by which part of the estate appeared to be in jointure to a widow at the time when her son suffered a common recovery, which was in 1699; and the defendants not being able to shew a surrender of the mother's estate for life, it was insisted that there was no tenant of the præcipe for that part, and that the remainder, under which the lessor claimed, was not barred. On the other hand it was said, that at that distance of time a surrender should be presumed; and to fortify this presumption, the defendant offered to produce the debt-book of Mr. *Edwards*, an attorney, long since deceased, in which there was a charge of 32*l.* for suffering the recovery; two articles of which were, for drawing a surrender of the mother's interest 20*s.*, and for engrossing two parts thereof 20*s.* more; and it appeared by the book that the bill had been paid. "And this being objected to as improper evidence, the Court was of opinion to allow it, for it was a circumstance material upon the inquiry into the reasonableness of presuming a surrender, and could not be suspected to be done for this purpose; that if *Edwards* was living, he might undoubtedly be examined to it, and this was now the next best evidence. And it was accordingly read." Now the principle upon which that case was decided was, that, upon looking at the deceased attorney's book, it appeared that he had made a charge for the surrender, and acknowledged that he had been paid the sum charged (*c*). So it was held in the case of *Stead* v.

(*a*) 2 Stra. 1129; *infrà*, 272.

(*b*) 3 Bro. & Bingh. 132, and 6 B. Moore, 355.

(*c*) But this was forty years after the time of the surrender, and the Court said that they would have presumed a surrender after such a length of time, without this additional evidence. In *Goodtitle* v. *The Duke of Chandos*, 2 Burr.

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Heaton (*a*), that an entry in the parish books, made by the officers of one township, of the receipt of a proportion of the church-rates from the officers of another township, was evidence to charge the latter with the payment of the same sums in future, and that the title at the head of the page, stating the customary proportion to be so paid, was also evidence: and it was there said by *Ashhurst*, J., that the last entry of the payment by the officers was clearly admissible, because the officers thereby charged themselves with the receipt. In *Barry* v. *Bebbington* (*b*) the right to the soil was in issue, and the plaintiff, who derived title under Lord *Barrymore*, offered in evidence several items contained in a book, in the handwriting of one *Ashley*, who had many years before been steward to Lord *Barrymore*, and who was then dead. The items were memoranda of receipts of money by *Ashley* from different persons by name, but whose situations were not mentioned, for trespasses committed on the common in question, paid on account of Lord *Barrymore*. The evidence was rejected; and a rule for a new trial was obtained on the authority of *Warren* v. *Greenville* (*c*), upon the ground that the evidence was improperly rejected; and that rule was afterwards made absolute. And Lord *Kenyon* there said, "It is clear that where a steward charges himself with the receipt of money, it shall be received in evidence before a jury, to shew that such sum was received by him." In *Higham* v. *Ridgway* (*d*) it was held, that an entry made by a man-midwife in his book, of having delivered a woman of a child on a particular day, referring to his ledger in which he had made a charge for his attendance, which was marked as paid, was evidence upon the trial of an issue as to the age of such child at the time of his afterwards suffering a common

1072, Lord *Mansfield* says, that the Court did not rely upon the entry; but he also states, from his own note, that the Court said, that after forty years they would, without any other circumstances, presume a conditional surrender. 1 Stark. Ev. 2d ed. 312, (*b*).

(*a*) 4 T. R. 669.

(*b*) 4 T. R. 514.

(*c*) 2 Str. 1129.

(*d*) 10 East, 109.

recovery (*a*). These cases establish, as a general principle, that where a person makes an entry charging himself with the receipt of a sum of money, that entry is evidence of the fact of the receipt of that money against a third person. The question as to the receipts then becomes immaterial. But if the entries in the book are admissible in evidence, because the ticks annexed to them denote that the collector had received the money, the receipts signed by him must, upon the same principle, be evidence of the fact of the receipt of the money by him. For these reasons I am of opinion that all the documents objected to in this case were properly received in evidence, and, consequently, that this rule must be discharged.

LITTLEDALE, J.—I am of the same opinion. For some time I entertained considerable doubt whether entries made in a private book, kept by an individual for his own convenience, could be evidence against a third person. In *Goss* v. *Watlington* (*b*) the books in which the entries were made by the deceased collector were *public* books, delivered to him by his predecessor in office; and in *Whitnash* v. *George* (*c*), the book in which the entry was made was one which the principal was *bound* to keep in performance of the very duty for which the surety had become bound. The rule established by those cases is a limited one, and I have felt some doubts as to the propriety of extending it to a case like the present. If, however, a private book ought, for this purpose, to be regarded in the same light as a public book, these entries were receivable in evidence. The

(*a*) But the evidence seems to have been received in that case principally upon the ground that the entry was made, of a fact within the peculiar knowledge of the party, against his interest; and *Le Blanc*, J., seems to have founded his assent, partly at least, on the particular nature of the fact, as being matter of pedigree. 1 Stark. Ev. 312.

(*b*) 3 Bro. & Bingh. 132.

(*c*) 8 Barn. & Cressw. 556; *ante*, vol. iii. 42.

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receipts, which were entries made on separate pieces of paper, would also be receivable upon the same principle; because the book is nothing more than pieces of paper put together. The cases referred to by my brother *Bayley* certainly establish this general principle, that where an individual, having peculiar means of knowing a fact, makes a declaration, verbal or written, of that fact, it being against his interest at the time, it is evidence of the fact, as between third persons, after his death. Those cases, however, are distinguishable from the present. There, the entries constituted all that the party making them intended to do. Here, the party evidently intended to make further entries in the public book; so that his acts were incomplete. Still, looking to the principle established by the several cases which have been referred to, I think the entries made in this private book were receivable in evidence; and if they were receivable as acknowledgments of the receipt of money, for which the party making them would otherwise have a claim, it follows that the receipts themselves must equally be receivable upon the same principle.

PARKE, J.—I am also of the same opinion. Secondary evidence of the contents of the private book was properly received, the defendant, who had the possession of it, not producing it after notice. Then the question is, whether the book itself, if produced, would have been receivable in evidence—that is, whether entries made in a private book, acknowledging that the party making them had received certain sums of money, are, after his death, admissible evidence against third persons, to prove the fact of the receipt of the money. The general rule undoubtedly is, that facts must be proved by testimony on oath. But there is an exception necessarily engrafted on that rule, within which the present case falls, namely, that an admission of a fact made by a deceased person against his own interest, is evidence of that fact as between third persons. Upon that

ground entries made by receivers, stewards, and agents of various kinds, charging themselves with the receipt of money, have been held good evidence, after their death, to prove the fact of the receipt of such money,—without reference to the particular character of the person making the entries. Thus, in *Warren* v. *Greenville* (*a*) the person making the entry was an attorney; in *Manning* v. *Lechmere* (*b*), a bailiff; in *Higham* v. *Ridgway* (*c*), a surgeon. In *Haddow* v. *Parry* (*d*), where a bill of lading had been signed by a master of a vessel, since deceased, for goods to be delivered to a consignee or his assigns, on his paying freight, the document was held to be evidence to shew that the consignee had an insurable interest in the goods (*e*). Having then established that such admissions are evidence of the facts admitted, it can make no difference that the same facts might have been proved by other means, as, for instance, by a living witness; and accordingly there are cases in which the admissions of deceased persons have been received, though the testimony of living persons might have been given. Thus, in *Barry* v. *Bebbington* (*f*), which was tried in 1791, one of the entries was of the receipt of a sum of money so recently before as 1785. The fact of that payment, therefore, could doubtless have been proved by the person who paid the money, and yet it was held that the entry made by the deceased steward, charging himself with the receipt of the money, was evidence of the

(*a*) 2 Str. 1129.

(*b*) 1 Atk. 453. It was held in that case that old rentals, by which bailiffs had acknowledged the receipt of moneys, were evidence of the payment of such rents, and of the right to receive them, if the bailiff or receiver were dead.

(*c*) 10 East, 109.

(*d*) 3 Taunt. 303.

(*e*) "But if, in such case, the master should guard his acknowledgment by saying — 'contents unknown,' so that he does not charge himself with the receipt of any goods in particular, the bill of lading, it is said, would not be evidence either of the quantity of the goods, or of property in the consignee." 1 Stark. Ev. 309, 2d ed. referring to an observation of *Lawrence*, J., 3 Taunt. 305. *Tamen quære* as to the latter position.

(*f*) 4 T. R. 514.

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fact of such receipt, without calling the person who paid it. Upon the same principle, the entries made in this case by the deceased collector were evidence of the fact of the receipt of the several sums of money, without calling the persons who paid them. In *Goss* v. *Watlington* (*a*) and *Whitnash* v. *George* (*b*), the ground upon which the entries were held admissible undoubtedly was, that they were made in a book which it was the duty of the principal to keep, and for the performance of which duty the surety was responsible. But it seems to me that those decisions may be supported on the more general principle, that an entry made by an individual cognizant of the fact, and having no interest to make a false entry, whereby he charges himself with the receipt of money, is evidence of the fact of the receipt of such money. It is unnecessary to consider the question as to the receipts, because the entries in the book being admissible, they are sufficient to entitle the plaintiff to the full amount of damages which he has recovered. But I cannot help thinking that they were admissible; and I doubt the propriety of that part of the decision in the case of *Goss* v. *Watlington* (*a*), by which the receipts of the deceased collector were held inadmissible.

Rule discharged (*c*).

(*a*) 3 Bro. & Bingh. 132; 6 B. Moore, 355.

(*b*) 8 Barn. & Cressw. 556; *ante*, vol. iii. 42.

(*c*) And see *Bullen* v. *Michel*, 2 Price, 399, 413; *Rowe* v. *Brenton*, (fifth day) *ante*, vol. iii. 268; *Ryle* v. *Haggie*, 1 Jacob & Walk. 234; *Short* v. *Lee*, 2 Jac. & Walk. 489; *Doe* d. *Gallup* v. *Vowles*, 1 Mood. & Rob. 261; *Spires* v. *Morris*, 9 Bingh. 687, and 3 Moore & Scott, 124; *Plaxton* v. *Dare*, *ante*, 1, and 10 Barn. & Cressw. 17; *Wright* v. *Doe* d. *Tatham*, 3 Nev. & Man. 268.

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HEYSHAM, Esq. *v.* JOHN FORSTER, the Treasurer of the Commissioners appointed for putting in execution a certain Act of Parliament, passed in the Forty-fourth Year of the Reign of his late Majesty King *Geo.* 3, intituled, "An Act for Lighting the Streets, Lanes, and other public Passages and Places, within the City of Carlisle, in the County of Cumberland, and the Suburbs of the said City, for Paving the Footpaths of the Streets of the said City and Suburbs, and for otherwise Improving the said City." (*a*)

A local paving act authorizes commissioners, at a meeting to be called *for that purpose*, to order footpaths to be raised &c., and directs that the entries in the commissioners books may be read in evidence. An entry in the books, stating that such an order was made at a meeting held *by public notice*, does not prove that the meeting was duly holden, so as to legalize the order. It should appear by the entry, or be shewn aliundé, that notice was given of the *purpose* for which the meeting was called.

THE declaration stated, that a messuage, situated in a certain street, called Watergates Lane, on the south side of

(*a*) By this act, sect. 1, certain commissioners are appointed.

By sect. 4, "The said commissioners, or any five or more of them, shall meet together in the Guildhall of the said city, or at such other place within the said city as they shall appoint for that purpose, on the 25th day of June, 1804, between the hours of ten and twelve of the clock in the forenoon of the same day, and shall then proceed to put this act in execution, and shall and may then, and from time to time afterwards, adjourn themselves to and meet at the place aforesaid, or at any other convenient place within the said city of Carlisle, as they or any five or more of them shall appoint; and if it shall happen that there shall not appear at any such meeting a sufficient number of the said commissioners to act or to adjourn to another day, or in case the commissioners so assembled shall omit or neglect to adjourn themselves, or in case it shall by any means happen that there shall be no adjournment made, or if there shall be any special occasion for any meeting, between the time of any meeting or any adjournment thereof, or at any other time, then and in any of the said cases, any three or more of the said commissioners, or their clerk, shall and may appoint a meeting to be holden at the place where the last meeting was appointed to have been held, or at some other convenient place within the said city of Carlisle, or the suburbs thereof, as they or he shall think proper, between the hours of ten in the forenoon and four in the afternoon of such day on which such meeting shall be called, notice thereof being given as hereinafter mentioned; and that at all meetings to be held in pursuance of this act, the said commissioners shall pay and defray their own charges and expenses."

By sect. 5, "Previously to any meeting of the said commissioners, to be held in pursuance of this act,

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the said street, in the parish of St. Cuthbert, Carlisle, in the county of Cumberland, was in the possession and occupation of *Isaac Bell*, as tenant thereof to the plaintiff, the reversion thereof then and still belonging to plaintiff,

subsequent to such first meeting as aforesaid, notice thereof in writing, signed by the clerk to the said commissioners, of the time and place of every such meeting, shall be affixed on the Market Cross of the said city of Carlisle, and upon such other places or buildings as the said commissioners shall from time to time direct or appoint, at least three days before every such meeting."

By sect. 6, "No act, order or proceeding of the said commissioners, shall be valid, unless made or done at some meeting to be held in pursuance of this act."

By sect. 8, "Fair and regular entries shall be made in a book, to be provided for that purpose, of all the acts, orders, and proceedings of the said commissioners, relative to the execution of this act, and of the names of the commissioners who shall be present at the respective meetings; and one or more of the said commissioners, who shall be present at such meeting, or their clerk, shall always subscribe his or their name or names at the end of the proceedings of the respective meetings; and all such entries, being so signed, shall be deemed originals, and shall be allowed to be read in evidence in all causes, suits, and actions, touching any thing done in pursuance of this act, and that such book shall at any of the meetings of the said commissioners, and at all other reasonable times, be open to the inspection of the said commissioners, and of all persons rated or assessed for the purposes of this act."

By sect. 55, "The said commissioners shall and may from time to time, and at all times, after the passing of this act, direct and order the present or future pavements of the footpaths of such of the streets and lanes within the said city of Carlisle, and the suburbs thereof, (except the footpaths within the abbey of the said city, and the precincts thereof) as the said commissioners, at any meeting or meetings to be called for that purpose, shall think proper, to be taken up, and the said footpaths to be raised, lowered, altered, and repaired, or new paved, or to be laid with flag or paving stones, as to them shall seem fit; and the persons to be appointed by them, for the purpose aforesaid, shall and have hereby full power and authority to do and perform the same; and if any person shall at any time wilfully obstruct, hinder, or molest any surveyor or other officer or person whatsoever, employed by virtue of this act, in the performance or execution of his duty or work, every person so offending shall for every such offence forfeit any sum not exceeding 20*l.* nor less than 5*l.*: provided always, that the breadth of the flagged or broad pavements to be laid on any of the said footpaths shall not exceed in any one place seven feet." (Local and personal acts, cap. lviii.)

which messuage then fronted and doth front the said street, and had and of right ought to have a door and passage from the ground floor thereof into the said street. Yet defendant well knowing &c., but contriving and intending to injure plaintiff in his reversionary estate and interest of and in the said messuage, whilst the same was so in the possession and occupation of *Bell*, as tenant thereof to plaintiff, and whilst plaintiff was so interested as aforesaid, to wit, on 28th May, 1828, and on divers &c., wrongfully and unjustly, without the licence and against the will of plaintiff, raised, and caused to be raised, a certain footpath in and upon the said street, on the south side thereof, of great breadth, to wit, of &c., and before and in front of the said messuage, and extending along the whole front of the same, by placing and laying divers great quantities of earth &c. in and upon the said street, to a much greater height than the said street, or the soil and pavement thereof, on the south side thereof, before were raised, and to the height of one foot higher than the level of the ground floor of the said messuage or dwelling-house, and so near and so close to and against the said front of the said messuage or dwelling-house, towards the said street, that the aforesaid door and passage of the said messuage or dwelling-house, from the ground floor thereof into the said street, became and was and still is greatly blocked up and obstructed, so that the said tenant and occupier of the said messuage or dwelling-house could not pass through or go out of the same door and passage thereof into the said street, nor from thence back again into the said messuage or dwelling-house, in so free, easy, and beneficial a manner as he might and would otherwise have done, and still of right ought to do, but was and still is obstructed, hindered and prevented, by the means aforesaid, from so doing. By means of which said several premises he the said plaintiff hath been and is greatly prejudiced, injured, and aggrieved, in his reversionary estate and interest of and in the said messuage or dwelling-house, with the appurtenances, so in the possession and occupation of the

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said *Isaac Bell*, as tenant thereof to the said plaintiff as aforesaid, to wit, at &c. Second count, for wrongfully *continuing* a raised footpath theretofore wrongfully placed and raised in the said street. Third count, as the second, but in respect of a house occupied by another tenant. Plea: not guilty. At the trial before *Hullock*, B., at the last spring assizes, the injury stated in the declaration was proved, and the book of proceedings kept by the commissioners, which is made evidence by the statute, being called for by the plaintiff's counsel, was produced by *Willoughby*, the present clerk of the commissioners; from which it appeared that on the 3d of March, 1828, an order had been made by them for flagging the footpath in question. The following is a copy of the entry:—"City of Carlisle, to wit. At a meeting of the commissioners, for putting into execution an act of parliament intituled 'An act for lighting the streets &c.,' held by public notice at the Town-hall, on Monday, the 3d day of March, 1828: Ordered, that the footpath leading from the top of Watergates Lane be flagged, to join the raised pavement made by Mr. *John Brown*, and also that the footpath be flagged from the top of Watergates Lane to the top of the brow. (Signed) *James Bowstead*, clerk." On the part of the plaintiff it was urged, on the 5th section, that the commissioners had no jurisdiction affecting footpaths, except at a meeting called *for that purpose*, which ought to have appeared on the face of the book. The learned judge was of opinion that the objection could not be sustained, inasmuch as the 4th section, which requires notice, is general,—and that as the heading of the proceedings stated the meeting to have been held *by public notice*, at the Town-hall, he was bound to presume that notice had been given in the form required by the act, and that if a *special* notice of the object of the meeting were necessary, he would presume that *such* a notice had been given. He therefore nonsuited the plaintiff, giving him leave to move to enter a verdict with nominal damages.

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In Easter term last, *E. H. Alderson* obtained a rule nisi for a new trial, or for entering a verdict for the plaintiff, upon three grounds; first, that the meeting at which the order was made was not a legal meeting; secondly, that the notice for convening the meeting should have specified the object for which it was to be held; thirdly, that the order was not for *raising*, but for flagging the footpath.

Patteson shewed cause. The only question is, whether the order was made at a *legal* meeting, so as to give the commissioners jurisdiction, for if the act complained of was within the scope of their authority, no action lies for the consequential damage; *Sutton* v. *Clarke* (*a*), *Governors and Company of the British Plate Glass Manufactory* v. *Meredith* (*b*). By the 4th section, if the commissioners do not adjourn themselves, no subsequent meeting is to be held without notice, which must be given in the form prescribed by the 5th section. It was contended, that under the 55th section, it was necessary to state in the notice that the object of the meeting was an alteration of the pavement; and it was said that there was no proof of any notice; but it is submitted that it lay on the plaintiff to prove the negative. The declaration states that the defendant, contriving to injure the plaintiff, raised a footpath in the street, whereby the plaintiff's interest in the house was injured. The action is brought against the treasurer of the commissioners in that capacity, which mode of proceeding assumes that the act complained of was done by the commissioners *in pursuance of their authority*, for if that were not so, the action should have been brought against the party who did the act. In *Williams* v. *The East India Company* (*c*), it was held,

(*a*) 6 Taunt. 29; 1 Marsh. 429.

(*b*) 4 T. R. 794.

(*c*) 3 East, 192. And see *Atkinson* v. *Hunter*, 2 Lutw. 1359; 12 Vin. Abr. *Evidence*, (S. b.) 3; *Aglionby* v. *Towerson*, Sir T. Raym. 400; *Powel* v. *Milbank*, 2 W. Bla. 851, 853, and 3 Wils. 355, 366; *Rex* v. *T. Rogers*, 2 Campb. 654; *Smith* v. *Huson*, 1 Phillimore, 287; *Calder* v. *Rutherford*, 3 Brod. & Bingh. 302, and 7 B. Moore, 158; *Morris* v. *Hunt*, 1 Chitt. R. 453; *Doe* d. *James* v. *Price*, *ante*, i. 683.

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that where the omitting to do a particular act would be criminal, the proof lies upon the party asserting such omission. [*Bayley*, J. Putting the oil of vitriol on board without notice, would clearly be *criminal*.] So here, it would be a wrongful act to make the order in question, if not made at a legal meeting. In *Williams* v. *The East India Company*, Lord *Ellenborough* says that the rule of law is, that where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law *presumes* the affirmative, and throws the burden of proving the contrary,—that is, in such case, of proving a negative,—on the other side. [*Bayley*, J. A *criminal* neglect of duty.] The cases cited by Lord *Ellenborough* are not of so criminal a nature as the act of putting oil of vitriol on board without notice, which might have endangered the lives of every person in the ship. *Monke* v. *Butler* (*a*) was a suit for tithes in the Spiritual Court, in which the defendant pleaded that the plaintiff had not read the 39 articles, and the Court put the defendant to prove that he had not done it. [*Bayley*, J. There the rector was in possession, and unless the possession be shewn to be illegal, it will be presumed to be legal.] Lord *Ellenborough* also refers to Lord *Halifax's case* (*b*), where, upon an information against Lord *Halifax* for refusing to deliver up the rolls of the auditor of the Exchequer, the Court of Exchequer put the plaintiff upon proving the negative, viz. that he did not deliver them, for a person shall be presumed duly to execute his office until the contrary appears; and to *Rex* v. *Coombs* (*c*), where the defendant having sworn an affirmative, and an information having been exhibited against him, the Court directed that the prosecutors should first give their probable evidence of the negative, and that the defendant should afterwards prove the affirmative if he could; and to *Gilbert's Law of Evidence*, in which it is said (*d*), that

(*a*) 1 Roll. Rep. 83.

(*b*) 12 Vin. Abr. *Evidence*, 202, (S. b) 3, and Bull. N. P. 298.

(*c*) Comberb. 57.

(*d*) Page 148. And see *Rex* v. *Leake*, 2 Nev. & Mann. 583.

where the law *supposes* the matter contained in the issue, then the opposite party, that is, the party who contends for the contrary of what the law supposes, must be put unto proof of it by a negative. Here, in order to prove that the commissioners did this wrongful act, the plaintiff, not content with shewing that the pavement was raised by the order of the commissioners, put in their books, which are made evidence by the 8th section, and which contained the order in question. This evidence, thus produced by the plaintiff himself, proved that proper notice had been given. In answer to the first objection, therefore, the defendant says, that the plaintiff was bound to prove the negative; and he further says, that the evidence produced by the plaintiff himself did, in fact, prove that affirmative, which he contends the defendant was bound to establish. But the statute requires a general, not a special, notice. It does not say that the commissioners shall be convened by a notice specifying the object of the meeting. The person who drew this act was aware of the form necessary to be used when a special notice was to be required; for in the 7th section such a notice is directed to be given, and no similar direction being in the 55th section, no special notice is required. The legislature did not mean that the notice under that section should mention the occasion of the meeting. This brings us back to the question, whether a general notice was given. The meeting in January broke up without adjourning. A subsequent meeting was held on the 4th of February, at which time an adjournment took place to the 3d of March, when the order was made. No person was called to prove the notice of the meeting of the 4th of February, but it appeared by the books that the meeting held on the 4th of February was adjourned to the 3d of March; that being a meeting by adjournment, it would be questionable whether a notice was necessary. The books put in by the plaintiff state, that the meeting was held by public notice. *Bowstead*, the clerk, had absconded, so that he could not be called to prove that the

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provisions of the act had been complied with. But the books were evidence of all the circumstances stated in them. In *Rex* v. *Martin* (*a*) the indictment averred, that *Best* had been appointed treasurer of the parish of Greenwich, and that the management of the poor in Greenwich was regulated by a local act, which provided that notice should be given, in a certain manner therein specified, of a vestry to be held on a certain day for the election of a treasurer. To prove the appointment of *Best*, there was offered in evidence an entry in the vestry-book, stating that at a vestry duly held in pursuance of notice, *Best* was appointed treasurer for the year ensuing. *Macdonald*, C. B. held, that due notice of the holding of the vestry was proved by the recital in the vestry-book. That was a stronger case than the present, because the Greenwich local act contained no clause to make the books evidence. If the act complained of here had been done without authority, the proper person to be sued would have been the party who did the wrongful act, and not the clerk of the commissioners. The books being put in by the plaintiff, he must take them for better and worse. [*Bayley*, J. The act was done by a person *employed* by the commissioners. *Parke*, J. The commissioners are not bound to act *personally* in the execution of the orders which they make. This is therefore unlike the case of a sheriff, who, being bound by law to act himself, is responsible for the misconduct of the person whom he may choose to employ. *Littledale*, J. Since the case of the *Governor and Company of the British Plate Glass Manufactory* v. *Meredith*, actions have been brought against commissioners for consequential damage, as for not shoring up a wall.] With respect to the third objection, the order, upon the face of it, imports that the footpath was to be *raised*. If, therefore, it were open to the plaintiff to take this point, it would not support the action.

(*a*) 2 Campb. 100. And see *Rex* v. *Manning*, 1 Burr. 377; *Rex* v. *Mayor, &c. of Liverpool*, 4 Burr. 2244, third point.

Dundas, on the same side. The third point was not taken at the trial. The nonsuit proceeded upon the overruling of the first two objections. With respect to the first point, it was admitted that the meeting would have been good if notice had been duly given. Upon the second point, the learned judge thought that it would have been better if a notice had been given signifying the object of the meeting, in order that the attention of persons interested might be drawn to it; but he said, that whether the notice should have been special or not, the entry on the book was evidence that a proper notice had been given. *Graham*, the inspector, is not dead, and might have been called.

Courtenay, contrà. The plaintiff's house was injured by the raising of the pavement. This was not an action of *trespass* for entering and flagging the plaintiff's land, but *case* for the injury to the reversion. The 77th section of the act is that under which the defendant must justify.

The plaintiff's first point is, that by the 6th section it was necessary to shew that the meeting was held *in pursuance* of the act. The 4th section regulates the meeting. The book is made evidence of what it contains, that is, of *acts done*, but it is denied that it is evidence of all that is there *stated*. But supposing the book to be evidence of every thing that appears on the face of it, it does not prove that the forms required by the act have been complied with; it only proves that a *public* notice had been given. If a witness had been called, and had said that a public notice had been given, that would have been insufficient, for such a notice may have been given by sending a bellman about the streets. *Rex* v. *Martin* is very distinguishable. There the entry was, "at a vestry duly holden pursuant to notice."

Then the order is not for the *raising* of the footpath, which is the specific injury of which the plaintiff complains. The flagging alone would have occasioned no injury. If the case had been within the act, the plaintiff

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would have had no right of action, his remedy would have been by appeal within six months; but he sees an order for *flagging*, and does not suppose that any appeal was necessary. [*Parke*, J. That would have been a very good argument if the action had been brought against the party who did the act.] The commissioners forbade us to interfere. [*Parke*, J. That is, certain individuals took upon themselves to forbid you. That might give you a remedy as against them.] If the plaintiff had indicted the parties for what they have done, he must have shown them guilty of *criminal* negligence. But here, the plaintiff is in possession, and it lies upon the party who intermeddles with that possession to prove his right so to do. [*Parke*, J. It does not appear that any person had a right to be present except the commissioners; but that does not remove the plaintiff from his argument, because if he had had notice of the object of the meeting, he might have petitioned, and he may have been lulled into security by the entry in the book.]

E. H. Alderson, on the same side. Public notice is necessary after an adjournment. Taking the whole together, it does not appear that due notice was given. [*Bayley*, J. Did you produce any evidence that notice had *not* been given? *Parke*, J. In *Rex* v. *Haslingfield*(*a*) the rule is stated to be(*b*), "that where a person is required to do an act, the not doing of which would make him guilty of a criminal neglect of duty, it shall be intended that he has duly performed it, unless the contrary be shewn." Would it not be "a criminal neglect of duty" to hold a meeting without due notice in this case, just as much as in the case of commissioners of inclosure in *Rex* v. *Haslingfield*?]

Armstrong, on the same side. Here, an act injurious to the plaintiff, is done under the order of the commissioners. The defendant was therefore bound to shew clearly that the commissioners were justified in making the order.

Cur. adv. vult.

(*a*) 2 Maule & Sel. 558. (*b*) Ibid. 561.

On a subsequent day the judgment of the Court was pronounced by

BAYLEY, J. in favour of the plaintiff, on the ground, that as the act required a *special notice* to be given, and the entry in the book was in the form usual in the case of a mere *common notice*, a doubt was raised whether the commissioners had done their duty by giving the *proper* notice,—and that the defendant was therefore bound to prove that they had done so.

Rule absolute to enter a verdict for the plaintiff.

PRICE *v.* ISAAC EDMUNDS.

ASSUMPSIT, by payee against maker of two promissory notes for 150*l.* each, payable at three and four months from the 3rd July, 1827, tried before *Park*, J., at the Gloucester city spring assizes, 1829. The note produced purported to be the joint note of the defendant and *Abraham Edmunds*. The defendant had signed the note as a surety for his brother *Abraham*. The plaintiff having sued *Abraham*, had, on 28th March, 1828, just before the assizes, accepted a cognovit from him, payable by three instalments; 70*l.* on the *twenty-eighth* of April, 70*l.* on the twenty-eighth of May, and the residue on the twenty-eighth of June, with liberty to issue execution for the whole in case of default. Had no cognovit been taken, and the plaintiff had obtained a verdict in that action, he could not, according to the practice of the Court, have issued execution until the

A., principal, and *B.*, surety, gave their promissory note to *C.* *C.* sues *A.*, and takes a cognovit payable by instalments, the first instalment to be paid on the day before that on which *C.* might have signed final judgment in the action if no cognovit had been given, with power to issue execution for the whole debt in case of default.

A. makes default at the day: Held, that *B.* is not discharged (*a*).

Whether *B.* would have been discharged if the first instalment had been duly paid, and the further instalments had thereby stood deferred to a day subsequent to that on which final judgment could have been signed if no cognovit had been given, *quære*.

(*a*) *Sed vide post*, 292 (*e*).

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twenty-ninth of April (*a*). Default was made in the payment of the *first* instalment.

Under the direction of the learned judge a verdict was found for the plaintiff, leave being reserved to move to enter a nonsuit. A rule nisi having been obtained,

First point: No time given.

Campbell now (*b*) shewed cause. This rule ought to be discharged on two grounds. First, no time was in fact given by this cognovit. The first instalment was payable on the 28th of April, and if any default was then made, the whole would become due. Now, Easter term, 1828, having begun on Wednesday the 23d of April, the plaintiff, if he had tried his cause at the assizes, could not have had execution until Monday the 28th, or Tuesday the 29th of April; and as the condition was not complied with, the parties are in the same situation as if the further extension of time had never been granted. [*Littledale*, J. I rather think we must look to the time when the cognovit was given, without reference to what took place afterwards.] The condition was not performed, and therefore no time was given. It is perhaps unnecessary to inquire what the effect would have been if the first instalment had been paid on the 28th April. But, secondly, supposing time had been given, the nature of the contract which this defendant entered into, by signing the promissory note, was such as to entitle the plaintiff to give time to the other maker, without discharging the defendant. The ruling of Lord *Ellenborough*, in *Laxton* v. *Peat* (*c*), is certainly against this position; but this case has often been cited, and as often overruled: *Ragget* v. *Axmore* (*d*), *Fentum* v. *Pocock* (*e*). So, in the earlier case of *Dingwall* v. *Dunster* (*f*), it was said by *Ashhurst*, J., and *Buller*, J., that

Second point: Extension of time immaterial.

(*a*) The sixth day of Easter term.

(*b*) 12th December, 1829, in the Outer Court.

(*c*) 2 Campb. 185. And see Pothier, Traité du Contrat de Change, partie 1, chap. 6, No. 177, 178.

(*d*) 4 Taunt. 730.

(*e*) 5 Taunt. 192, and 1 Marsh. 14.

(*f*) 1 Dougl. 247.

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nothing but an express agreement can discharge an acceptor; and in *Kerrison* v. *Cooke* (*a*), *Gibbs*, C. J., was of opinion that the acceptor was not discharged by time given to the drawer, for whose accommodation the acceptance had been given. In *Anderson* v. *Cleveland* (*b*), Lord *Mansfield* said, "The acceptor of a bill, or the maker of a note, always remains liable." [*Littledale*, J. No time was given there.] But the proposition that an acceptor is *always* liable was laid down without qualification.

Russell, Serjt., and *Busby*, in support of the rule. Time was clearly given. With regard to *Raggett* v. *Axmore*, the rule is correctly stated on the other side, provided it be understood to refer to the rights of third persons, and not to transactions between the surety and the party who gives the time. It is not necessary here to decide whether an acceptor of an accommodation bill is to be considered as a mere surety, as in *Laxton* v. *Peat* (*c*), and in *Collott* v. *Haigh* (*d*), which is to the same purpose. *Fenton* v. *Pocock*, if attentively considered, is in favour of the defendant. [*Bayley*, J. Does not the maker of a note, by signing the instrument, make himself absolutely liable at all events? If you had wished that the defendant should be merely a surety, you should have made the defendant payee of the note, and his liability would have been only a collateral liability upon his indorsement. *Parke*, J. Have you any case where the party was allowed to shew that he stands in a different position from that in which he would appear to be on the face of the bill? Here, you are seeking to shew that the contract expressed in the note is not the real contract between the parties.] If a bill or note be made payable at a certain day, you are not allowed to say that there was an agreement between the parties that the bills should be renewed, but you may shew, as between the

(*a*) 3 Campb. 362.
(*b*) 13 East, 430, n.
(*c*) *Suprà*, 288, (*c*).
(*d*) 3 Campb. 281.

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immediate parties, that no *value* was received, though the bill is expressed to be drawn for value. In the case of a bond, it is competent to a co-obligor to shew that the plaintiff was merely a surety. [*Bayley*, J. The contrary was held in *Davey* v. *Prendergrass* (*a*). *Littledale*, J. In *Rees* v. *Berrington* (*b*), it was held that the surety was entitled to relief; but that was in equity.] *Garrett* v. *Jull* (*c*) shews that the Court may look to see who is the principal and who the surety. [*Bayley*, J. That case goes no further than this,—that if you receive from the principal a smaller sum in lieu of the whole, you cannot sue the surety for the residue, as he might be entitled to say—I have a right to be put in a situation to sue my principal. So, if you sue one of two partners, and discharge the partner whom you sue.] It must be admitted that if the Court think that the effect of the agreement now set up is to *alter* the written contract, the defence cannot be supported. [*Bayley*, J. Suppose a joint liability to exist, as in the case of two partners, one of whom obtains time,—will the other partner be discharged? *Parke*, J. Shewing the party to be a surety does not shew that he is discharged from the contract by which he engaged *as* a principal.] The cases as to the discharge of sureties are collected in a note to *Maltby* v. *Carstairs* (*d*). *Larton* v. *Peat* (*e*) is still law. In *Ragget* v. *Axmore*, it was not made out in evidence that the bill was accepted as an accommodation bill. The cases therefore are not parallel in two respects: first, the plaintiff there, when he took the bill, was not aware that it was an accommodation bill. Indeed, it did not there appear that the defendant knew it at any time. So, in *Fenton* v. *Pocock*, the defendant did not know that it was an accommodation bill. In *Carstairs* v. *Rolliston* (*f*), *Gibbs*, C. J., says that he would give no opinion upon this point. This

(*a*) 5 B. & A. 187; 2 Chit. 336.
(*b*) 2 Vesey, jun. 540.
(*c*) B. R., M. 22 *Geo.* 3, Selw. N. P. 7th ed. 377.
(*d*) *Ante*, vol. i. 562 (*a*).
(*e*) *Suprà*, 288 (*c*), 289 (*c*).
(*f*) 5 Taunt. 551; 1 Marsh. 207.

was after the decision of the cases of *Ragget* v. *Axmore* and *Fenton* v. *Pocock*. The point may be considered as res integra. [*Bayley*, J. Might not a party be continually surprised by evidence to shew that the defendant was merely a surety, and that he had notice of that fact, although in reality no such suretyship ever existed?] A party may be surprised with false evidence in any case. After the giving of this cognovit, the plaintiff could not have received the debt from the surety without a breach of the contract, for indulgence entered into with the principal. [*Bayley*, J. Suppose the surety willing to pay, his right so to do would not be superseded.] It would be a fraud upon the principal. [*Parke*, J. It is entirely a new case.] Every acceptance purports to be an acceptance for value. No person ever thought of accepting a bill, expressing in such acceptance that it was for the accommodation of the drawer:—Yet, in an action by an indorsee against the drawer, it is competent to the former to excuse himself from presentment for payment and notice of dishonour, by shewing that the bill was accepted for the accommodation of the payee. Again, an accommodation acceptor may sue the drawer for any damage he may have sustained by reason of the bill's not having been taken up, when it became due, by the drawer. *English* v. *Darley* (*a*), *Claridge* v. *Dalton* (*b*).

Cur. adv. vult.

BAYLEY, J., now (*c*) delivered the judgment of the Court.—The first question in this case is, whether the defendant is at liberty to shew that he was only a surety. If he is at liberty to do this, then he contends that time was given to the principal, and that he is thereby wholly discharged. The first question, namely, whether the defendant is at liberty to deviate from the form of the instrument

(*a*) 2 Bos. & Pull. 62.
(*b*) 4 Maule & Selw. 226.
(*c*) 15th December, 1829, in the Outer Court.

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which he has signed, would render it necessary to decide upon the conflicting cases of *Laxton* v. *Peat*, *Garrett* v. *Jull*, &c. I reserve to myself full power of considering that point when it shall become necessary. But we are all of opinion that the foundation here fails. It is said that time was given to the principal by the cognovit, the terms of which were to pay 70*l.* on the 28th of April, with a proviso for giving further time for the payment of the remainder of the debt, if the 70*l.* were paid on that day. Time therefore was given, at all events, until the 28th April. Whether any further time should be given depended upon the contingency of the payment of 70*l.* on that day. The first instalment was not paid. The bargain was, to surcease until the 28th of April. Then we are to consider what was the fair intent of that bargain. The principal debtor had a right to keep the plaintiff out of his money until the 29th or the 30th of April. He had pleaded the general issue; the effect of which was to prevent the plaintiff obtaining final judgment until the fifth day of the following term. This question has frequently arisen as between principal and bail, though not in the form in which it was here presented to the Court. Here is a defendant, who has a right to postpone (*a*) the payment till a certain day; but he says he

Distinction between time given to the principal debtor, in cases where the surety is immediately liable, and time given in cases where the liability of the surety does not arise until the expiration of such time.

(*a*) Where the time given to a defendant, by cognovit or otherwise, does not extend beyond the period at which final judgment could have been signed in case no time had been given, neither the position of the bail (whose liability cannot attach until final judgment has been signed and a ca. sa. issued,) with respect to the plaintiff, nor that of the defendant towards the bail, is in the slightest degree altered or affected. Whether a cognovit be given or not, the plaintiff cannot, by attacking the bail, set the bail in motion against the defendant. The case would be the same with respect to any other surety, *whose liability did not attach before the day on which, by the terms of the cognovit, the plaintiff would be at liberty to proceed against the defendant.* But where the default for which the surety is answerable is complete at the time the cognovit is taken, or at any time before the day to which the payment is postponed, the position of the surety with respect to the plaintiff, and of the defendant towards the surety, appears to be altered in the very

will withdraw his plea if the plaintiff will not put him in a worse situation, but will give him till the 28th of April. He had a right to indulgence up to that time. It was only that which the defendant had a right to insist upon; a benefit which he possessed and had a right to keep. It was therefore not a giving of time to the principal.

LITTLEDALE, J.—I am of opinion that this was not that sort of giving of time which will discharge the defendant. If, when the note became due, the holder had entered into an absolute engagement to give six or twelve months, the case would have been very different. Here, an action is brought, and there is a proposal of a cognovit. If the time specified in the cognovit for the payment of the money is *earlier* or the *same* as that on which the payment would have otherwise been enforced, it is all right; for why should the creditor be put to the expense of trial and execution, when he can obtain the same objects without. Here, the principal had shewn his intention of taking that

point which forms the ground of the discharge of the latter, viz. that if the surety were not discharged, it would be competent to the plaintiff to enforce immediate payment from the surety, who would have his remedy over against the defendant *before the cognovit became due*, in violation of the terms of that cognovit. "If a holder enter into an agreement with a prior indorser, in the morning, not to sue him for a certain period of time, and then obliges a subsequent indorsee, in the evening, to pay the debt, the latter must (may) immediately resort to the very person for payment, to whom the holder has pledged his faith that he shall not be sued." Per Lord *Eldon*, C. J., in *English* v. *Darley*, 2 Bos. & Pull. 62.

In the principal case, if the cognovit given by *Abraham Edmunds* did not discharge his brother *Isaac*, it would have been competent to *Price*, the plaintiff, to arrest *Isaac* the hour after the cognovit was given; and if *Isaac* paid the money, (which it would be his duty and interest to do,) it would have been competent to him to arrest *Abraham* by return of the mail from London; and *Abraham*, who had waived his defence to the action in order to purchase his liberty till the 28th April, would find himself in custody on the 30th March,—precisely as if no cognovit had been given, and no indulgence had been stipulated for as the price of his submission in the action.

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time which the forms of the law would have allowed him to take, whether the plaintiff had assented or not. Here time was not given, because the condition was not complied with. Though this is not precisely the same as the case of bail, we ought not to enter into nice distinctions. Bail are not discharged if the same time is given which the principal would otherwise have been entitled to.

Whether, upon an instrument in this form, the defendant could set up such a defence, is a question of more difficulty and of great importance. Upon this point there is a difference of opinion upon the bench.

PARKE, J.—I concur in thinking that the defendant is not discharged, because *no* time was given. Bail would not be discharged under such circumstances.

Upon the other point there is a difference of opinion in the Court. I have already intimated a strong opinion upon it. I think *Fenton* v. *Pocock* very good law.

Rule discharged (*a*).

(*a*) And see *Bank of Ireland* v. *Beresford*, 6 Dow, 234; *Dunn* v. *Slee*, Holt, N. P. C. 399; *Ellison* v. *Dezell*, Selw. N. P. 7th ed. 355; *English* v. *Darley*, 2 Bos. & Pull. 61, 3 Esp. N. P. C. 49, and Bayley on Bills, 152; *Ex parte Gifford*, 6 Ves. 807; *Gould* v. *Robson*, 8 East, 576; *Harrison* v. *Courtauld*, 3 Barn. & Adol. 36; *Hewet* v. *Goodrick*, 2 Carr. & Payne, 468; *Hill* v. *Read*, Dowl. & Ryl. N. P. C. 26; *Jay* v. *Warren*, 1 Carr. & Payne, 532; *Lee* v. *Levy*, 6 Dowl. & Ryl. 475, 4 Barn. & Cressw. 390, 1 Carr. & Payne, 553, 675; *Nisbet* v. *Smith*, 2 Brown, C. C. 579; *Orme* v. *Young*, Holt, N. P. C. 84; *Philpot* v. *Bryant*, 4 Bingh. 717, 1 Moore & Payne, 754, 3 Carr. & Payne, 346; *Pole* v. *Ford*, 2 Chit. Rep. 125; *Pring* v. *Clarkson*, 2 Dowl. & Ryl. 78, and 1 Barn. & Cressw. 14; *Tindal* v. *Brown*, 1 T. R. 167; *Withall* v. *Masterman*, 2 Campb. 179; *Stevens* v. *Lynch*, ibid. 332, and 12 East, 38.

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STANNARD *v.* HARPER.

Slanderous words, charged as addressed *to* the plaintiff in the second person, are not supported by evidence of words spoken *of* him in the third person, though so spoken in his presence.

CASE. The second count charged the defendant with having slandered the plaintiff by defamatory words, addressed by the defendant to the plaintiff in the *second* person. At the trial before *Vaughan*, B., at the Suffolk spring assizes, 1829, the words proved were words defamatory of the plaintiff, used in his presence, but addressed to one *J. S.*, and in which the plaintiff was spoken of in the *third* person. A verdict was found for the plaintiff, the learned judge giving leave to the defendant to move for leave to enter a nonsuit. *F. Kelly* having accordingly obtained a rule,

Storks, Serjt., now shewed cause. As the plaintiff was *present* when the defamatory charge was made, the change of *person* does not vary the sense. There can be no substantial difference between saying to *A.*—"*You are* a thief," and saying to *B.* of *A.*, in the presence and hearing of *A.*—"*He is* a thief."

PARKE, J.—The rule is, that you must prove the *precise* words laid in the declaration; not indeed *all* the words which are charged, but so much of them as will constitute a sufficient cause of action.

LITTLEDALE, J.—No distinction can be made as to whether the party, of whom the words are spoken, is present or absent. It would be introducing quite a new rule.

BAYLEY, J., concurred.

Rule absolute (*a*).

(*a*) Contrà per Lord *Hardwicke*, C. J., at nisi prius, in *Nelson* v. *Dixie*, Cas. temp. Hardw. 305. But it seems to be impossible to believe that the learned judge can have stated the law of defamation in the manner in which he is there represented to have done. And see Cro. El. 645, 857; 3 Mod. 72; 2 Salk. 601.

1829.

BOROUGH *v.* MOSS, Gent., one &c.

A debt due from wife dum sola, cannot be set off against a note given to the wife after marriage, if the husband elect to treat the note as his several property.

As where he sues upon it in his own name.

Or indorses it over to a third person.

And it is immaterial that the wife joins in the indorsement.

Whether the debt could have been set off in an action brought on the note by the husband and wife, *quære.*

The indorsee of an over-due bill or note, is affected by all equities attaching to the bill or note; but not by a *set-off*, which would have been available against the indorser.

ASSUMPSIT on a promissory note, bearing date 13th February, 1826, whereby the defendant promised to pay *John Fearne, by the name of Rachael Fearne,* or order, 150*l.*, with interest, at nine months after notice, and by *John Fearne* indorsed to the plaintiff. Plea: non assumpsit. At the trial before *Burrough*, J., at the last Derby spring assizes, the following facts appeared:

Rachael Harrison, the holder of a promissory note for 200*l.*, made by one *Birch*, having married *Fearne*, *Fearne* requested the defendant to enforce payment from *Birch*. The defendant, as an inducement to *Fearne* not to sue *Birch*, who was his client, paid *Fearne* 50*l.*, and made and delivered to *Fearne* the note in question for 150*l.*

21 April, 1826. *Fearne* gave notice to the defendant to pay off the note at the end of nine months.

January, 1827. The defendant paid 50*l.* with the interest then due.

March, 1827. *Fearne* and his wife indorsed the note to the plaintiff, who paid *Fearne* the amount then remaining due for principal and interest.

The defendant gave evidence of two professional bills, one for 51*l.*, due to him from *Rachael Harrison*, dum sola, and another for 28*l.* from *Fearne* himself.

The learned judge was of opinion that these sums could not be set off, and directed the jury to find a verdict for the plaintiff for 100*l.* and interest; but gave the defendant leave to move to reduce the verdict, if the Court should be of opinion that either of the bills of costs ought to have been allowed. A rule nisi having been obtained,

Balguy now showed cause. This note operates, in point of law, as if it had been made payable to *Fearne* only, and his wife had not been noticed; *Barlow* v. *Bishop* (*a*), *Bull.*

(*a*) 1 East, 432.

N. P. 179, *Boehm* v. *Stirling* (*a*). At the time when this note was indorsed, there was nothing upon the face of it denoting that it had been reduced, either by payment or by set-off, beyond the sum of 50*l.*, which the defendant had paid in January, 1827.

N. R. Clarke, on the same side. There is no case in which it has been held that the indorsee of a bill or note takes it subject to any right of *set-off* which may have existed against the indorser; *Charles* v. *Marsden* (*b*). In *Brown* v. *Davies* (*c*), the note had been paid; *Boehm* v. *Stirling* is to be taken with reference to a question of *fraud; Tinson* v. *Francis* (*d*), was the case of an *accommodation note.* In all the cases in which this defence has prevailed, there has been something to affect *the note itself.* The latest case is *Collenridge* v. *Farquharson* (*e*). In that case, a bill was indorsed over by a party with whom it had been deposited merely as a security, and the only point decided was, that the books of the indorser were inadmissible to shew the state of the accounts between him and the party by whom the bill had been deposited. The question there raised was, not as to the point of law, but as to the mode of proof. The objection would apply to notes payable on demand. [*Bayley*, J. No, it would be laches to keep a banker's cheque.] No notice of set-off was given. [*Littledale*, J. That only applies to actions between the parties.] *Coppin* v. *Craig* (*f*) shews that such a set-off may be pleaded. [*Littledale*, J. It may be pleaded, but it would be admissible in evidence under the general issue.] Secondly, if the defendant is to be placed in the same situation as if he had pleaded a set-off, he ought to have given some notice of his intention to set up these cross demands, and not to have taken the plaintiff by surprise.

(*a*) 7 T. R. 423.
(*b*) 1 Taunt. 224.
(*c*) 3 T. R. 80.
(*d*) 1 Campb. 19.
(*e*) 1 Stark. N. P. C. 259.
(*f*) 7 Taunt. 243; 2 Marsh. 501.

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Adams, Serjt. contrà. The statutes of set-off may always be evaded by the holder of a note, if by indorsing it over, after it has become due, a right of action can be transferred to the indorsee discharged of the set-off. Husband and wife may sue jointly on a note given to the wife during coverture, *Philliskirk* v. *Pluckwell* (*a*), and if the husband had died first the right of action would have survived to her, and the debt due from her before marriage might have been set off. And if *Fearne* had sued in *his own* name, either during the coverture or after his wife's death, the debt due from him might have been set off. If *Fearne* had brought an action in the *joint* names during the coverture, the debt due from her before coverture might have been set off, and also the debt due from him, inasmuch as the money recovered in such joint action would enure to the benefit of the husband.

BAYLEY, J.—I am of opinion that the defendant has no right of set-off in respect of the 51*l.* The note being made payable to the wife, it was optional with the husband to treat it as joint property or as his own exclusively. If he had elected to treat this note as their joint property, a sett-off in respect of the 51*l.*, due from her before coverture, might perhaps have been let in; but by indorsing the note over, he has elected to treat it as his several property, and the bill of costs due from the wife before coverture cannot be set off. With respect to the 28*l.*, I wish to consider the case further.

LITTLEDALE, J.—If *Fearne* had brought an action on the note in his own name only, no debt could have been set off except that due from *Fearne* himself. And if a *joint* action had been brought, I do not think it clear that the 51*l.* could have been set off.

(*a*) 2 Maule & Selw. 393.

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PARKE, J.—An agreement, to which the holder is a party, affecting the note, creates an equity which attaches itself to the note, and is binding upon any person who takes it after it is over-due. It does not however follow that a right of *set-off* would also be available against such an indorsee. If any set-off can be claimed, it can only be in respect of the 28*l.*, the husband having clearly elected to treat the note as being his own, and not the joint property of himself and wife.

On a subsequent day, BAYLEY, J. said, that upon discussing the point as to the 28*l.*, with Lord *Tenterden* and the two other judges, they were all of opinion that the indorsee of an over-due bill of exchange or promissory note, was affected by such equities only as attached on the bill or note itself, and not by claims in respect of collateral circumstances (*a*).

Rule discharged.

(*a*) *Quære*, if the indorsee had *notice* of the matter of set-off.

SERVANTE and others *v.* JAMES.

A covenant with the part-owners of a ship, and their several and respective executors &c., to pay money, to accrue for the hire of the ship, for freight of goods and for compensation for the use of the ship's tackle

COVENANT. The first count stated, that by articles of agreement, made 30th August, 1815, between defendant of the one part, and *Elizabeth Servante*, *R. James*, *H. Stephens*, *T. Britton*, and *J. Bull*, the plaintiffs, *W. Baker*, *T. Read*, *R. Russell*, and *W. Slocombe*, since deceased, of the other part, after reciting that the defendant was commander of the Lady Hobart, employed in the service of the Postmaster-General, and that the plaintiffs and *W. B.*, *T. R.*, *R. R.*, and *W. S.*, were owners of the vessel in the shares set opposite their names, the defendant, for himself, his

&c., to the covenantees, their and every of their several and respective executors &c., at a certain banking-house, in such parts and proportions as were set against their several and respective names, is a several covenant, and cannnot be sued upon by the covenantees jointly.

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executors &c., covenanted with the several other persons, who should execute the articles, *and their several and respective* executors &c., that during so long time as the vessel should be so employed, and he should continue to be commander thereof, he the defendant would pay unto the owners of the vessel, *and to their and every of their several and respective* executors, administrators and assigns, the yearly sum of 480*l.*, or such other sum as should be allowed to the owners of the vessel by the Postmaster-General for the time being, for the hire of the vessel, to commence from 25th August then instant, and to be paid to them at &c., and in such parts and proportions as were set against *their several and respective names*, and would pay half-yearly, at &c., unto the owners, *and to their several and respective* executors &c., one-third part of the freight of all coin &c., for which freight should be paid, as should be conveyed in the vessel, during so long time as she should be so employed, and he should continue commander. And it was thereby mutually covenanted by and between the parties thereto, that when the vessel should be discharged from such service, or the defendant should die, give up, or quit the vessel, the cables &c. should be appraised by two sets of tradesmen, one set to be chosen by and on the behalf of the defendant, his executors &c., and the other by and on the behalf of the owners, their executors &c., and the difference of value between such appraisement and the original cost of such cables &c., or the cost of the like articles, if to be purchased new at the time of such appraisement, should be made good to the owners, their executors &c., *according to their shares and proportions aforesaid*, by the defendant, his executors &c., which difference the defendant thereby covenanted to make good and pay accordingly, immediately after such appraisement. Averment: that the plaintiffs and the deceased subscribed their names and affixed their seals to the articles in manner following; that is to say, *R. J.*, *H. S.*, *W. B.*, *T. B.*, *T. R.*, *R. R.*,

and *J. B.*, as respectively being each the owner of one sixteenth share of the vessel, the said *W. S.* as the owner of two sixteenth shares, and the said *E. S.* as the owner of six sixteenth shares; that the vessel continued to be employed in such service from 25th August, 1815, to 8th October, 1828, during which time the defendant continued to be commander; that the Postmaster-General, during all that time, allowed 480*l.* for hire &c.

Second count, for non-payment of a penalty of 1000*l.* upon non-performance of the same covenant. Breaches were assigned in non-payment of the money allowed for hire of the vessel, of one-third part of the money paid for freight of coin &c., and of the difference between the valuation of the cables &c., when defendant gave up the command, and the original cost.

General demurrer,—and joinder.

Campbell, in support of the demurrer. The plaintiffs have declared jointly upon alleged breaches of three covenants; but as by the terms of the articles all moneys now sought to be recovered are made payable to *each* of the ship-owners who should execute the articles, no such *joint* action can be maintained. The question who are to be plaintiffs in an action of covenant, must be determined by the nature of the interest of the parties suing. The cases are collected with great care by Serjt. *Williams*, in his note to *Eccleston* v. *Clipsham* (*a*). It is immaterial whether the *language* of the covenant is joint or several. It is true, that in the case of a several action *against* one of two joint covenantors, the omission of the other covenantor can only be taken advantage of by plea in abatement; but in the case of *covenantees* suing, there is no option; the form of the action must pursue the legal interest in the subject-matter of the covenant. If the action *may* be brought by three, it *cannot* be maintained by one. Here, a separate action might have been maintained by each ship-owner. It was originally

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(*a*) 1 Wms. Saund. 154, note (1).

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contemplated, that all the owners might possibly not execute the articles. The defendant therefore covenants to pay them in such parts and proportions as are set against *their several and respective names*. Suppose all the ship-owners to be paid except one, it is clear that such unpaid owner would have a separate and distinct interest. The right accrues to each owner, according to his share in the vessel. The covenant is with their *respective executors, administrators and assigns*, whereas if the right of action is joint, it would survive, and the executors and administrators of the deceased covenantees would take nothing. The plaintiffs must contend, that if all had been paid except one, and that one had died, his executors could not sue. *Owston* v. *Ogle* (*a*) is directly in point, and differs no otherwise from the present case than in this, that the contract there was not under seal. But that circumstance is immaterial with reference to the present question. The law as to joinder of parties is the same in assumpsit as in covenant. That was an action for not accounting and dividing the net profits. Lord *Ellenborough* says, "each of the adventurers was to *derive* from the ship's husband the account of the ship's proceedings; what had been disbursed, and what she had earned; in order that he might have the means of ascertaining the amount of his own share. Is it not then reasonable that the covenant to account should be *several?*" [*Bayley*, J. In *Owston* v. *Ogle* it was held, that the action *might* be several. In *Powis* v. *Smith* (*b*), *Abbott*, C. J., in delivering the judgment of the Court, said, "I take it to be quite settled, that where there is a joint lease by two tenants in common, reserving an entire rent, the two may join in an action brought to recover the same; but that if there be a separate reservation to each, there must be separate actions (*c*).

(*a*) 13 East, 538.

(*b*) 5 Barn. & Alders. 850, and 1 Dowl. & Ryl. 490.

(*c*) 5 Barn. & Alders. 851. But in 1 Dowl. & Ryl. 491, the words are given thus: "I take it to be quite settled, that where there is a joint lease by tenants in common,

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Parke, J. The question is here upon the construction of this particular covenant. *Littledale*, J. In *Collins* v. *Prosser*(a) the Court held, that under the words "for which payment we bind ourselves, and *each of us* for himself, for the whole and entire sum of 10*l. each*," the parties were liable *separately*, but not *jointly*.]

E. H. Alderson, contrà. In this case the interest in the covenant is joint. The defendant does not covenant to pay separately to each, but to pay the whole into a bank, on the joint account of the covenantees. [*Parke*, J. In order to comply with the covenant, must not the defendant pay the money into the bank to the credit of the respective owners, according to their respective shares and interests?] It would be a breach of covenant if the portion of *A*. were paid in without the portion of *B*. The interest in the covenant is joint. Then the question arises, whether it is not optional here to sue jointly or severally. There is nothing in *Owston* v. *Ogle* to shew that a joint action would not have lain.

BAYLEY, J.—To make this a joint covenant, it would be necessary to strike out the words "according to their respective shares and proportions." The defendant might pay one share in at one time, and another at another, specifically to the use of a particular owner. If the defendant paid one man in full, the remedy as to the residue would be to be enforced by the parties who had not been paid. Each sustains a separate and independent injury. By the terms of the covenant, the defendant is not to pay the whole to the surviving covenantees.

reserving a joint and undivided rent, they may both join in an action for the rent,—*and the same principle seems to govern where the lease is joint and the rent is reserved separately.*"

(a) 3 Dowl. & Ryl. 112, and 1 Barn. & Cressw. 682.

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LITTLEDALE, J.—Though the covenant purports to be with the ship-owners jointly, its legal operation must ensue the nature of the interest. The rule is correctly laid down in *Eccleston* v. *Clipsham* (*a*), and the notes—in which the cases are collected. Supposing one of the covenantees, who had been paid his sixteenth share, had survived the rest, could it have been contended that he would be the person to sue for the share due to the representatives of the deceased covenantees?

PARKE, J.—It was settled in *Slingsby's* case (*b*), that "where it appears that every one of the covenantees hath or is to have a several interest or estate there, when the covenant is made with the covenantees et cum quolibet eorum, these words, cum quolibet eorum, make the covenant several *in respect of their several interests* (*c*)." Here, the interest was clearly *several*. The money ought to have been paid in to the separate credit of each part-owner (*d*). If it had been paid to one *joint* account at the banker's, it could not have been drawn out without the concurrence of *all* the parties. This inconvenience it was probably the object of these articles to avoid.

Judgment for the defendant (*e*).

(*a*) 1 Saund. 154, and note (1), in the fourth and fifth, and note (*a*) in the fifth edition. *Et vide suprà*, 301.

(*b*) 5 Co. Rep. 18 b.

(*c*) But as the right of *one* or of *several* parties to bring an action of covenant, must in all cases ensue the nature of the estate or interest of the covenantees, the insertion or the omission of the words "et cum quolibet eorum" appears to be immaterial; *vide* note (*c*) to 1 Wms. Saund. (fifth edition) 155.

(*d*) *Vide* 1 Nev. & Mann. 594, note (*a*).

(*e*) And see *Justice Windham's* case, 5 Co. Rep. 7 b.; *Browning* v. *Beston*, Plowd. 140 b.; *Lee* v. *Nixon*, 3 Nev. & Mann. 441.

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HARPER *v.* HAYTON, Esq.

ASSUMPSIT for money had and received against the late sheriff of the county of Hereford. At the trial before *Park*, J., at the Hereford Spring Assizes, 1829, the following facts appeared:

The plaintiff having entered into a recognizance in 40*l.* conditioned for her appearance at the quarter sessions, and having made default, the recognizance was forfeited and estreated. A copy of the estreat roll, including the estreat of the plaintiff's recognizance, being sent to the defendant, as sheriff, with the writ of distringas, fieri facias, and capias, as required by the second section (*a*) of 3 *Geo.* 4,

Where upon a recognizance forfeited at quarter sessions, the sheriff has levied part of the penalty, and has the defendant in execution for the residue, the sessions have jurisdiction over the whole recognizance, and if the sheriff has notice that they have discharged the defendant wholly therefrom, before the money levied had been paid over to the treasury, an action for money had and received lies against the sheriff for the amount.

Whether any notice of the order, or any demand of repayment is necessary, *quære.*

(*a*) Which enacts "that all fines, issues, amerciaments, *forfeited recognizances*, sum or sums of money *paid or to be paid* in lieu or satisfaction of them or any of them, (save and except the same shall by virtue of any act or acts of parliament made or to be made, be otherwise directed to be levied, recovered, appropriated or disposed of,) which already are or hereafter shall be set, imposed, lost, or forfeited, by or before any justice or justices of the peace in that part of the United Kingdom called England, shall be and are hereby required to be certified by the justice or justices of the peace by or before whom any such fines, issues, amerciaments, *forfeited recognizances*, sum or sums of money *paid or to be paid* in lieu or satisfaction of them or any of them, shall be set, imposed, lost, or forfeited, to the clerk of the peace of the county, or town clerk of the city, borough, or place, in writing, containing the names and residences, trade, profession, or calling of the parties, the amount of the sum forfeited by each respectively, and the cause of such forfeiture, signed by such justice or justices of the peace, on or before the ensuing general or quarter sessions of such county, city, borough, or place respectively; and such clerk of the peace or town clerk shall copy on a roll such fines, issues, amerciaments, *forfeited recognizances*, sum or sums of money *paid or to be paid* in lieu or satisfaction of them or any of them, together with all fines, issues, amerciaments, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them or any of them, imposed or forfeited at such Court of General or Quarter Sessions; and shall within such time as shall be fixed and determined by such Court, not exceeding twenty days, after the adjournment of such Court, send a copy of such roll with a writ of distringas and capias or fieri facias and capias, according to the form and effect in the schedule marked (A.)

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c. 46 (*b*), the defendant levied to the amount of 1*l.* 8*s.* 7*d.*, and took the plaintiff in execution for the residue. She was afterwards discharged from her recognizance by the Court of Quarter Sessions, under the sixth section (*c*) of the act. The defendant had not, previously to the discharge of the plaintiff, passed his accounts at the Exchequer, but he had returned the 1*l.* 8*s.* 7*d.* as levied under the estreat and writ. The learned judge, upon being pressed with the authority

annexed to this act, to the sheriff of such county, or the sheriff, bailiff, or officer of such city, borough, or place having execution or process therein respectively, as the case may be, which shall be the authority to such sheriff of such county, or the sheriff, bailiff, or officer, as the case may be, for proceeding to the immediate levying and recovering of such fines, &c. on the goods and chattels of such several persons, or for taking into custody the bodies of such persons, in case sufficient goods and chattels shall not be found whereon distress can be made for recovery thereof; and every person so taken shall be lodged in the common gaol until the next general or quarter sessions of the peace, *there to abide the judgment of the said Court.*"

(*b*) Amended by 4 *G.* 4, c. 37.

(*c*) Which enacts "that the Court of General or Quarter Sessions, before whom any person so committed to gaol or bound to appear shall be brought, is hereby authorized and required to inquire into the circumstances of the case, and shall, at its discretion, be empowered to order the discharge of the whole of the forfeited recognizance, *or sum of money paid or to be paid* in lieu or satisfaction thereof or any part thereof; and such order shall be made in the form or effect of the schedule marked (C.) to this act annexed, and shall be signed by the clerk of the peace, which said order shall be a discharge to *such** sheriff, bailiff, or officer, on the passing of his accounts at the Exchequer, or before any auditor or other proper officer duly authorized to pass the same; and in all cases where the party shall have been lodged in the common gaol by such sheriff, &c. the justices of the peace so assembled are hereby empowered either to remand such party to the custody of the sheriff, &c., or, upon the release of such party from the whole of such forfeited recognizances, to order such party to be discharged from custody; and such order shall be a full and sufficient discharge to the said sheriff, &c. on passing of his accounts at the Exchequer, or before any auditor or other proper officer duly authorized to pass the same; and it shall and may be lawful to and for the said Court of General or Quarter Sessions to award such costs, charges and expenses, to be paid by either party to the other, as to the said Court shall seem just and reasonable."

* *Sic* in the act, though the sheriff is not mentioned before.

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Where upon a recognizance forfeited at sessions, the defaulter has *paid* the penalty to the sheriff, in order to prevent a sale of his goods taken in execution, the sessions have no power of mitigating the penalty, under 3 *Geo.* 4, c. 46, s. 6.

of *Haynes* v. *Hayton* (*a*), was of opinion that the Court of Quarter Sessions had no authority over the recognizance,

(*a*) This was an action of assumpsit for money had and received, brought against the present defendant to recover back a payment made to him, as sheriff of the county of Hereford, on account of two forfeited recognizances of 40*l.* each. At the trial before *Bosanquet*, Serjt. at the Hereford Spring Assizes, 1827, it appeared that an indictment for a forcible entry had been found against the plaintiff and his wife at the Easter sessions, 1824; that the plaintiff entered into the recognizances in question for the appearance of himself and wife respectively; that the indictment was immediately removed by certiorari, at the instance of the indictees; that at the July sessions 1824, the recognizances were estreated; that at the Spring assizes, 1825, the indictees were acquitted; that on the 25th August, the clerk of the peace prepared and sent to the sheriff a writ containing a copy of (inter alia) the two recognizances of the plaintiff, together with a writ of distringas, fieri facias, and capias; that the defendant having seized the plaintiff's goods under such writ for the 80*l.*, and having refused to take securities, the plaintiff paid the amount to the defendant in redemption of his goods, which were thereupon restored to him; that the defendant returned the estreat roll and the writ at the following Michaelmas sessions; when that Court, upon the application of the plaintiff, made an order mitigating each recognizance to 13*s.* 4*d.*, and requiring the clerk of the peace to make out the necessary orders for discharging the sheriff on passing his account from the residue; that the clerk of the peace duly transmitted the orders of sessions to the defendant; that the defendant had, on passing his accounts at the Exchequer, been discharged from the amount of the recognizances, except the two sums of 13*s.* 4*d.*; and that the defendant had subsequently promised to repay the residue to the plaintiff on being allowed to retain his poundage.

It was contended by *Taunton*, for the defendant, that from the language of the enacting part of the statute, and the form of the writ, the sessions had power to order the recognizances to be discharged only where the party was in custody or had given security, and not where execution had been executed on his goods, upon which the money levied belonged to the crown, and must be paid as directed in the act. The learned judge, however, being of opinion that the amount received by the defendant was "a sum of money paid in satisfaction of a forfeited recognizance," and that the sessions had authority to make the order, directed a verdict for the plaintiff, recommending that the poundage should be deducted, in order to avoid a motion for a new trial. A verdict was accordingly taken for 74*l.* 15*s.* 8*d.*

A rule nisi having been obtained by *Taunton* for a new trial, cause was shewn by *Maule* and *Whitcomb*, who again urged, that under the discretionary power given to the

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and nonsuited the plaintiff. In last Easter term a rule nisi was obtained by *Maule* for a new trial; against which

justices at sessions by section 6, not only over the forfeited recognizance, but over money *paid* or to be paid in satisfaction thereof, the Court of Quarter Sessions had, notwithstanding the payment, authority to mitigate the recognizances. They also urged, that supposing the quarter sessions had executed their authority, the defendant, by retaining the 74*l.* 15*s.* 8*d.* from the crown, and expressly promising the plaintiff to return that sum to him, had admitted that he held it for the plaintiff's use.

On the part of the defendant it was contended by *W. E. Taunton*, that the authority of the sessions was confined to two cases: viz. where the defendant was actually in custody, or where he had given the security required by sect. 5.

The Court (*Bayley*, J., *Littledale*, J., and *Parke*, J.,) having taken time for consideration of their judgment,

Bayley, J., after stating the facts of the case, proceeded as follows:—It has been insisted that the plaintiff was entitled to recover; first, on the statute,—secondly, on the under-sheriff's promise,—and thirdly, on the ground that the sheriff took credit in the Exchequer for the two sums of 39*l.* 6*s.* 8*d.*, and 39*l.* 6*s.* 8*d.* As to the latter ground, it appears to us, that if the sessions had no authority to make the order in question, that order is wholly void, and the sheriff's omission to insert these sums in his accounts delivered into the Exchequer does not alter the case; for he is still accountable there; and if that be so, there was no *consideration* for his promise to pay the plaintiff, and it becomes nudum pactum. The question depends upon this, whether the 3 *G.* 4, c. 46, s. 6, authorizes the sessions to discharge the recognizance *in all cases*, or in those cases only where the party has been *committed* to gaol or become *bound* in sureties to appear at the sessions. If a general jurisdiction is given to the sessions, then the plaintiff is right; otherwise he is wrong. It was admitted by the plaintiff's counsel, that the sessions had no other jurisdiction than that given by the 3 *G.* 4, c. 46. By section 2 of that act, it is enacted, "that all fines, forfeited recognizances, sum or sums of money paid, or to be paid in lieu or satisfaction of them, shall be certified by the justices of the peace, by or before whom such fines, forfeited recognizances, &c., shall be imposed or forfeited, to the clerk of the peace; and that such clerk of the peace shall copy on a roll such fines, forfeited recognizances, &c. and send a copy of such roll, with a writ of distringas and capias, or fieri facias and capias, to the sheriff, which shall be the authority to such sheriff for proceeding to the immediate levying of such fines, forfeited recognizances, &c. on the goods and chattels of such several persons, or for taking into custody the bodies of such persons, in case sufficient goods and chattels shall not be found." Then section 5, (which is very inaccurately worded,) provides

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Taunton, now shewed cause. The plaintiff must recover by force of his own title. It is no matter whether the

"that if any person on whose goods and chattels such sheriff shall be authorized to levy any such forfeited recognizance, or sum of money to be paid in lieu or satisfaction thereof, shall give security to the sheriff for his appearance at the next general or quarter sessions, there to abide the decision of the Court, and also to pay such forfeited recognizance, or sum of money, &c. together with all expenses, as shall be ordered and adjudged by the court, it shall be lawful for such sheriff to discharge such person, so giving such security, out of custody; provided also, that in case such party so giving such security shall not appear in pursuance of his undertaking, it shall be lawful to the Court to issue a writ of distringas and capias, or fieri facias and capias, against the surety or sureties of the person so bound as aforesaid." I think that clause does not extend to cases where the party *pays* the money, or where the sheriff *levies* on the goods, but is confined to cases where the sheriff has *taken the body*. Then comes section 6, under which alone the plaintiff had power to apply to the sessions, and they had jurisdiction. That section enacts, "that the Court of Quarter Sessions, before whom any person committed to gaol or bound to appear shall be brought, is authorized and required to inquire into the circumstances of the case, and shall, at its discretion, be empowered to order the discharge of the whole of the forfeited recognizance, or sum of money paid in lieu or satisfaction thereof, or any part thereof; which order shall be a discharge to the sheriff, &c. on the passing of his accounts at the Exchequer." The power given to the sessions to order this discharge of a forfeited recognizance is, therefore, confined to cases in which a party brought before the sessions has been committed to gaol or been bound to appear. If it had been intended to give the sessions a *general* discretion in *all* cases, it is impossible to suppose that this language would have been used. By the second section, the plaintiff might be committed to gaol. By the fifth section, he might be bound to appear at the next quarter sessions; but in this case the party was neither committed to gaol nor bound to appear at the next sessions. He paid the money. Therefore, it seems to us, that as the authority of the sessions was limited to those cases only, they had no power to make the order in question. The 4 *G.* 4, c. 37, s. 3, (which is a legislative exposition of the former statute,) enacts, "that where a party subject to any fine, forfeited recognizance, &c. shall reside or shall have removed from or out of the jurisdiction of the sheriff in which such fine, &c. shall have been incurred, &c. it shall be lawful for such sheriff to issue his warrant, together with a copy of the writ, directed to the sheriff acting for the county or place in which such person shall then reside or be, or in which any goods or chattels shall be found, requiring such sheriff to execute such writ; and the

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sheriff wrongfully retained the money, unless he also wrongfully received it, or retained it to his *own use*. In *Haynes* v. *Hayton*, the plaintiff was not committed and did not give the security. Here, the plaintiff did not pay the whole: 1*l*. 8*s*. 7*d*. only was paid instead of 20*l*., and the party was committed for non-payment of the residue.

It is submitted that though the magistrates had jurisdiction, it was a limited jurisdiction, and they had no power to order the discharge of the plaintiff from the whole recognizance. As soon as the 1*l*. 8*s*. 7*d*. was paid, it was money had and received to the use of the crown, and ought to be paid over to the treasury. It was not competent to the magistrates to *arrest* the money and prevent its reaching the treasury. The magistrates having exceeded their authority in ordering a general discharge, their order, according to *Haynes* v. *Hayton*, was void. But supposing the Court of Quarter Sessions *had* power to discharge the plaintiff from the whole of the recognizance, even then the case does not become the same as if no recognizance had ever been executed, and no levy made. If so, the imprisonment would be a wrongful act, for which there is no justification.

The sheriff must, at all events, withhold the money, subject to the direction of the treasury. The course for the plaintiff to take should be either to present a memorial or a petition to the king. If this action is maintainable, the

said sheriff, &c. within thirty days after the receipt of the warrant, is required to return to the sheriff from whom he shall have received the same, what he shall have done in the execution of such process, *and whether the party shall have given good and sufficient security to appeal at the ensuing general or quarter sessions* to be held for the county from which the writ issued; and in case a levy shall have been made, to pay over all monies received in pursuance of the warrant to the sheriff from whom he shall have received the same." If the sheriff is to make that return, it shews that the party had no power to go to the sessions unless such security were given; and as the sessions have power to award costs under the fifth section of the 3 *G*. 4, c. 46, that power would be nugatory unless the security were given. Upon the whole we are of opinion that the sessions had no power over the recognizance. The rule for a new trial must therefore be made absolute.

Rule absolute.

plaintiff might have sued the sheriff the very moment that the recognizance was discharged. [*Bayley*, J. Must not the sheriff be served with an order? The sheriff cannot be accountable to the plaintiff until he has had notice of the discharge from the recognizance. That point, however, does not arise here; the sheriff is not answerable to the crown if the recognizance is *discharged* by a competent authority.] There is no proof of notice on the sheriff. [*Bayley*, J. In this case the sheriff must have had notice.] It is not shewn that the defendant was authorized by the treasury to return the money to the plaintiff; or that he was actually discharged from the estreat. [*Bayley*, J. The statute does that. *Parke*, J. After the order, the sheriff was not answerable to the crown.]

Maule, contrà. The justices had jurisdiction to make the order for discharging the plaintiff from the recognizance, and *money had and received* is the proper remedy. [*Parke*, J. The justices have an absolute discretion. It was competent to them to have ordered the money to remain in the hands of the sheriff to the use of the crown.] The liability of the sheriff to the crown arises from the estreat, and that being doubtful, it stands as if no forfeiture had been incurred and no estreat made. Here he was stopped by the Court.

BAYLEY, J., after adverting to the provisions of 3 *Geo.* 4, c. 46, sect. 2, 5, and 6, proceeded as follows:—In *Haynes* v. *Hayton* the Court decided, that, except in the two cases of commitment and security, the justices at sessions had no jurisdiction. The authority given is not a general but a limited authority. In this case the party has been *committed*. The sessions had, therefore, no doubt, *some* jurisdiction. We must go on further and see whether any limitation is imposed. It is quite clear that the justices were entitled to take something into their consideration. It would be singular if the party were bound to seek his

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discharge partly at the sessions and partly at the treasury; the statute uses the words "paid or to be paid." They may therefore discharge *money paid.* But they have jurisdiction over the whole matter. If the sheriff continued to be accountable to the treasury, he would clearly not be bound to pay the plaintiff. But the act says "that the Court of Quarter Sessions shall at its discretion be empowered to order the whole of the forfeited recognizance, or sum of money paid or to be paid in lieu or satisfaction thereof, or any part thereof, and such order shall be in the form or to the effect of the schedule marked (C.) to this act annexed." Then the order framed according to the form given by the act distinctly says that he is to be discharged as to the *whole.* Then the recognizance being out of the way the sheriff is not accountable to the treasury, but to the party. No tender having been pleaded, it is immaterial to consider whether the defendant was authorized to make a tender.

LITTLEDALE, J.—There does not seem to be any good reason why there should not be jurisdiction where the money has been paid. Here, however, the party is brought before the sessions, and therefore that Court has jurisdiction. The sessions are authorized not only to discharge the whole recognizance, but by express words that Court has jurisdiction over any part paid or not paid. The question is, whether the defendant is to pay to the treasury or to the plaintiff, the defendant having levied part of the money, and taken the party in execution for the remainder. The sheriff having levied part, would not make his payments into the Exchequer by piecemeal, but would wait to see what was done as to the residue (*a*). The sessions might not have discharged the plaintiff, who then would have been bound to pay the remainder. Here, the sheriff is forbidden to pay into the treasury.

(*a*) But if the sheriff had to pass his accounts before any further sum was obtained by the incarceration of the defendant, he would be bound to account for so much as he had received.

Payment was demanded of the sheriff, though I doubt whether any demand was necessary. It was the duty of the defendant to know what was doing at the sessions; knowing that an order *might be* made, it was the defendant's duty to ascertain whether any order *was* made.

PARKE, J.—I am of the same opinion. The plaintiff was brought before the sessions, and that Court had jurisdiction to discharge in whole or in part. The defendant was originally bound to account to the Court for the sum which he had levied. But from this he was discharged by the order. It is not necessary to say whether any notice or demand was necessary.

Rule absolute (*a*).

(*a*) Since the passing of 3 *G.* 4, c. 46, the Court of Exchequer has ceased to have jurisdiction under 4 *G.* 3, c. 10, or the standing writ of privy seal, (whereby the barons are empowered to discharge, mitigate, or compound forfeitures or penalties estreated into the Exchequer from other courts,) over recognizances forfeited at quarter sessions, whereof the yearly duplicate or certificate required by 3 *G.* 4, c. 46, s. 14, has been delivered into that Court. Therefore, where a recognizance for appearing and preferring an indictment at sessions had been forfeited and certified into the Court of Quarter Sessions, and the forfeiture had been levied by the sheriff, the Court of Exchequer held, that they were not authorized to order the discharge of the recognizance, although the justice of peace, before whom the recognizance had been taken, had not complied with the fourth section of the statute, by giving the party bound, notice of the time and place at which the sessions were holden, and although the party had unsuccessfully applied for relief at the ensuing sessions. *Rex* v. *Hawkins*, Macleland & Younge, 27.

An indictment for an assault had been traversed by the indictee, who with two sureties entered into a recognizance conditioned for his appearing, entering, and trying the traverses at the next sessions. The traverser gave the prosecutor no notice of trial before the next sessions, but moved there to respite the recognizances to the following sessions. The application was refused, and the recognizances were ordered to be estreated. A distringas, fieri facias, and capias issued against the traverser and his sureties. On motion to bring in recognizances, estreats, and warrants into the Court of Exchequer, it was held, that inasmuch as the estreats were not returned into the Exchequer, that Court had no jurisdiction, and that relief could be granted

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by the quarter sessions only. *Rex* v. *Thompson*, 3 Tyrwh. 53.

But where forfeited recognizances have in fact been estreated into the Exchequer, that Court is not ousted of its jurisdiction by 3 *G.* 4, c. 46, or by 4 *G.* 4, c. 37, and such recognizances may be discharged or compounded by that Court according to the circumstances of the particular case. *Pellow, in re*, 13 Price, 299, *S. C.* per nomen *Pellew, Ex parte*, Macleland, 111.

DAUBNEY, Gent. one &c. *v.* COOPER and others.

A conviction before magistrates, upon an information under the game laws, is a judicial proceeding, at which all the king's subjects for whom there is room, and against whom there rests no special ground for exclusion, have a right to be present.

TRESPASS. The declaration stated that the defendants assaulted and beat the plaintiff, and forced him out of a room called the Justice Room, in a certain inn called the White Hart, at Market Raisin, in the county of Lincoln, in which room the defendants, as justices &c., assigned &c., were then holding a court of petty sessions, whereby the plaintiff was prevented from exercising, following and transacting his lawful and necessary business as an attorney in the said room. Plea: not guilty. At the trial before *Best*, C. J., at the last spring assizes for the county of Lincoln, the following facts appeared:

An information, under 5 *Ann.* c. 14, was laid against *James Preston*, for using a gun to kill game, not being qualified. *Preston* requested the plaintiff, who is an attorney, to appear for him upon the information. Upon the plaintiff's presenting himself accordingly, at the petty sessions, he was informed by the magistrates that it was their rule not to admit attorneys, and that therefore he would not be allowed to appear for *Preston*. The plaintiff withdrew, but no conviction took place. Another information was afterwards laid against *Preston*, upon a similar charge, for an offence alleged to have been committed on the 3d January, 1828. On 14th February, *Preston* was summoned to appear on this information on the 18th. *Preston* again employed the plaintiff to appear for him, and did not himself attend the sessions. The plaintiff again presented himself at the justice room, at Market Raisin, at the time

and place on which the summons was returnable. The defendant, *Cooper*, who was one of the magistrates present, being informed that the plaintiff attended on behalf of *Preston*, told him that the magistrates had resolved not to allow an attorney to appear for parties summoned before them, and desired him to leave the room. The plaintiff insisting upon his right as an attorney, to appear for *Preston*, upon the information, refused to leave the room; upon which *Cooper* directed the constable to remove him, which was accordingly done. It was urged on the part of the defendants, that the plaintiff had no right to insist upon attending before the magistrates as an attorney for the defendant in the information; that this was a sufficient justification for the defendants,—who were proved to be magistrates,—upon the general issue, under 7 *Jac.* 1, c. 5. A verdict was entered by consent, for 1*s.* damages, against all the defendants, leave being reserved to them to move to enter a nonsuit. A rule nisi having been obtained accordingly, in Easter term,

Denman now shewed cause. The question to be considered is, whether, upon the evidence given at the trial, the learned judge ought to have nonsuited the plaintiff. I am not disposed to inquire whether the objection could be raised on the general issue. [*Bayley*, J. Were they attending at the *Petty Sessions?*] They were. An attorney has generally a right to be present during the proceedings against his client (*a*), *Gilman* v. *Wright* (*b*). In *The Queen* v. *Simpson* (*c*), whch was a case of deer-stealing, it was held that a party duly summoned might be convicted in his absence. As in the case of deer-stealing, *Preston* was

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(*a*) March, 141, pl. 214, where the Court said, "that an attorney at *common law* is an attorney in every inferior Court, and therefore ought not to be refused," and *committed* the steward of a Court Baron for refusing to suffer a defendant to put in any other attorney than one of the attorneys of that Court.

(*b*) 1 Ventris, 11; 2 Keble, 477; 1 Siderf. 410.

(*c*) 10 Mod. 344; 1 Stra. 44.

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not bound to appear in person (*a*). [*Littledale*, J. The magistrates had authority to issue the usual summons.] The magistrates may convict in the absence of the party charged; it is a privilege belonging to the attorneys of the superior courts to be entitled to practise in any inferior court.

The Statute Westm. 2, c. 10, was cited at the trial as an authority for the defendants, but it appears on the contrary to establish the plaintiff's right to appear for his client. In *Rex* v. *A. B. and C. D., Justices of Staffordshire* (*b*), *Bayley*, J. is reported to have said, "an attorney in all events has no right to appear." *Rex* v. *A. B. and C. D., Justices of Staffordshire*, was cited in the argument of *Cox* v. *Coleridge* (*c*); but in the latter case *Bayley*, J. disclaimed being bound by the obiter dictum which he is reported to have used on the former occasion. The decision in *Cox* v. *Coleridge* proceeded on the ground that what had taken place before the magistrates, was merely a preliminary inquiry (*d*). The decision proceeded entirely upon that ground. The Court pointed out the inconvenience which would result from giving *publicity* to such previous inquiry. [*Bayley*, J. I believe that in that case a distinction was taken between a *preliminary* inquiry and an inquiry upon which there may be a *conviction*.] Lord *Tenterden* there says (*e*), "This being only a *preliminary* inquiry, and not a *trial*, makes, in my mind, *all the difference*." The question here is, whether the proceeding before these defendants was not *a trial*, and whether

(*a*) Vide *Rex* v. *Hall*, 6 Dowl. & Ryl. 843; *Rex* v. *Commins*, 8 Dowl. & Ryl. 344.

(*b*) 1 Chit. Rep. 219. And see the notes to that case.

(*c*) 1 B. & C. 37, 2 D. & R. 86.

(*d*) But see *Rex* v. *Whately*, *ante*, iv. 437 n., 438 n., and the observations there made upon the circumstance, that in *Cox* v. *Coleridge*, the attention of the Court does not appear to have been drawn to the cases in which it has been held, that if a witness examined under 1 & 2 *P. & M.* c. 13, and 2 & 3 *P. & M.* c. 10, die before the trial of the felony, his examination may be received in evidence against the prisoner, *because* the prisoner had an opportunity of cross-examining him. And see Hale, P. C. 262, 263; Sir Tho. Jones, 53; Kelynge, 18.

(*e*) 1 Barn. & Cressw. 50.

it was necessary, for the purposes of justice, that the defendants should have such professional assistance as he deemed it expedient to engage and employ. Was the plaintiff lawfully present? He might be there for several lawful purposes; one such purpose might be to state an *excuse* for the non-appearance of his client upon the summons. He might plead guilty, and pay the amount of the penalty instanter, for the purpose of avoiding an execution; he might plead not guilty, and examine witnesses to establish a lawful defence. Much injustice might be done, if the party were liable to be convicted without being heard through the person whom he had employed to appear for him. It is said that as the party was not present, he had no right to appear by attorney, even assuming that if he had himself attended, he might have had his attorney by his side. Upon further consideration, the circumstance of the absence of the party charged, will be found to strengthen the argument in favour of the right of his attorney to appear. He can never be in a worse situation, as to the right of being represented, by not being able to attend in person. [*Parke*, J. There is a third question not touched upon, namely, whether the plaintiff was entitled to be present as one of the king's subjects.] In *Garnett* v. *Ferrand* (*a*), which was the case of the coroner, that defence was pleaded specially. [*Bayley*, J. The coroner's court is a court of *preliminary inquiry* (*b*).] In this case, the nature of the inquiry which was going on at the sessions, was not perhaps much considered. The justices were judges of record, sitting in judgment upon the question, whether the then defendant had incurred a forfeiture or not,—and their judgment was not traversable.

Fynes Clinton, on the same side. *Cox* v. *Coleridge* is an

(*a*) 6 Barn. & Cressw. 611, and 9 Dowl. & Ryl. 657.

(*b*) The decision however proceeded on the ground that no action lies against a judge of a court of record, for an act done in his *judicial* capacity. In the present case *that* point was not raised.

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authority for the plaintiff. [*Parke*, J. The decision in *Cox* v. *Coleridge* turned upon its being a case of preliminary inquiry. The other point was not decided either one way or the other.] The first point to be considered is, whether a party brought before magistrates, upon a charge in a case in which the magistrates have power to convict, is entitled to professional assistance; the second point is, whether, when the party charged is *absent*, it is competent to him to depute another person to appear for him. The cases which have been cited appear to leave no doubt upon that point. Under 5 *Ann.* c. 14, the party may, upon proof of service of the summons, be convicted, though he do not appear (*a*). Suppose the case of a person duly summoned and *unable* to attend, it would be a great hardship and injustice to exclude the defence which his attorney was ready to make for him. The mode in which attorneys were formerly appointed, rests in much obscurity; 2 *Inst.* 376. [*Parke*, J. Are there any statutes authorizing the appointment of attorneys in all sorts of actions? *Bayley*, J. A deaf and dumb person may appoint an attorney in all actions.] There are many cases at common law in which a man may appoint an attorney to appear for him; *F. N. B.* 156. This, however, appears to be mere matter of antiquarian research. The general inference of law is, that in all inferior courts the attorneys of the superior courts are entitled to appear. In most courts of requests acts, a clause is introduced to *exclude* attorneys. The object of this clause is to avoid expensive costs. The *exclusion* may be considered as a legislative recognition of the *right*. [*Parke*, J. That does not follow. The attendance before courts of requests, which the legislature thought it right to prevent, may, in the absence of such a legislative power, have been matter of right or matter of favour only. Such an enactment may have been necessary for the purpose of excluding an admission of the attorney *by favour*. It can

(*a*) *The Queen* v. *Simpson*, 10 Mod. 345; *Rex* v. *Hall*, 6 Dowl. & Ryl. 84; *Rex* v. *Commins*, 8 Dowl. & Ryl. 344.

hardly be said that the petty sessions were not a *court*.] The petty sessions did not exist at the time when this statute passed. The first acts empowering to convict by summary jurisdiction, passed in the reign of *Charles* 2. [*Bayley*, J. The statute of *Anne* does not require that the conviction should take place at the petty sessions.] Every magistrate acting under that statute is a *judge*, and the room in which he sits is a *court*. It cannot be contended that a man may be *convicted* of a misdemeanor *in private*. The power entrusted to the magistrates by the statute, is in derogation of the common law, and at variance with all the principles of that law. This makes it the more necessary to adhere to rules of the common law in every particular not expressly taken away; more especially when it is considered, that under some of these statutes the magistrates have power, upon conviction, to inflict two years' imprisonment. [*Bayley*, J. The Court cannot look into the question of more or less jurisdiction.] A party summoned to appear before magistrates on such a charge, ought to have the same means of defending himself as in any other Court. The question is, whether, when called upon to make his defence, a party charged with such an offence is not entitled to professional assistance. [*Parke*, J. And to see what is proved against him.] In cases of misdemeanor, the defendant may be convicted without being present. The defence may be conducted by counsel, or where no counsel is employed, by an attorney, not quà attorney, but as an advocate, as in criminal proceedings there is no attorney on the record. [*Bayley*, J. How would you draw up the conviction?] The conviction might set out the fact specially, or state the appearance of the defendant generally. In the crown office it is not necessary that any *appearance* should be entered; the attorney merely goes to the crown office and enters the defendant's plea. There is no statute enabling such defendant to appear by attorney. As far as appears by the record in the crown office, the defendant may have been in Court the whole time. The plaintiff may

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have come for the purpose of stating his client's inability, by reason of sickness, to attend. By this statute, if the money is not paid immediately, the justices are to imprison the defendant for three months, and they have no power to relieve against such imprisonment, although the money be paid on the very next day. It appears from *Glanville*, that at common law the defendant in a real action might send *any* person to excuse his non-attendance (*a*). In *Cox* v. *Coleridge* (*b*), *Abbott*, C. J. says, "The nature of the proceedings also shews that this cannot be demanded properly as a *right*. What is it? It is only a *preliminary inquiry*,—whether there is sufficient ground to commit the prisoner for trial." *Holroyd*, J. says (*c*), "A magistrate, *in cases like the present*, does not act as *a court of justice*. He is only an officer deputed by the law to enter into *a preliminary inquiry*." *Best*, J. says (*d*), "So far was this examination (under 2 & 3 *Phil. & Mary*, c. 10,) from being a judicial inquiry, which means *an inquiry in order to decide on the guilt or innocence of the prisoner*, &c." Here, the proceeding *was* an inquiry *to decide on the guilt or innocence* of the party. Even where the evidence is set out upon the face of the conviction, it is not competent to the party convicted to raise any question as to the character or the credibility of the witnesses. The justices perform the functions of a jury, but their decisions are not, like those of a jury, subject to revision. In modern acts of parliament, a summary form of conviction is commonly given, which by excluding all mention of the evidence upon which the justices proceed, renders the correction of any improper decision still more difficult; and when the grossest errors in law are committed, it is almost impossible to set the matter right. *Garnett* v. *Ferrand* (*e*) decided nothing more than this,—that a coroner being a judge of an ancient court of record,

(*a*) And see Com. Dig. *Exoine*, (B. 4.)

(*b*) 1 Barn. & Cressw. 49, 50.

(*c*) Ibid. 51, 52.

(*d*) Ibid. 53, 54.

(*e*) 9 Dowl. & Ryl. 657, and 6 Barn. & Cressw. 611.

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no action lies against him for an act done in his judicial capacity. Assuming that his conduct has been as corrupt as possible, no action lies,—the remedy, or rather the punishment, must be by a criminal prosecution. *Garnett* v. *Ferrand* is in effect an authority for the plaintiff, as shewing that this defendant had no power to exclude him. It was contended there that the coroner's court was a court in which a *deodand* might be forfeited; but the answer given(*a*) is conclusive, namely, that the inquest is traversable in every particular. [*Parke*, J. I do not consider that the Court decided *that*. The judgment of the Court in *Garnett* v. *Ferrand* proceeded on the ground, that the judge of a Court of record must be invested with a discretionary power, and that the exercise of his discretion cannot be made the subject of inquiry *in an action of trespass*.]

Adams, Serjt., in support of the rule. It may be matter of regret that the question intended to be raised by the parties cannot properly be raised in this action. It is a question which has created a great deal of agitation in the country, but the point cannot be decided upon this motion. If any doubt existed as to the conduct of the plaintiff, the case might go to a new trial. [*Bayley*, J. Upon the evidence, there is no ground for saying that the plaintiff *misconducted* himself.] The question is, whether a party can, without any cause being assigned, appear before justices by attorney. At common law, every man was bound to appear in person, and not by attorney; *Beecher*'s case (*b*), 2 Inst. 249, 377, 378; F. N. B. 25; *Page* v. *Tulse* (*c*), *Tidd*, 92, n.(*d*). By 6 *Geo.* 2, c. 27, s. 2, any person admitted an attorney in any of his majesty's Courts of record at Westminster, is made capable of being admitted to practise as an attorney in any inferior court of record, "provided such person be in all other respects capable and qualified to be admitted an attorney, *according to the usage and custom of*

(*a*) 6 Barn. & Cresw. 616.
(*b*) 8 Co. Rep. 58.
(*c*) 2 Mod. 83.
(*d*) 9th edition.

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such inferior court." This enactment is extremely important, as regulating the admission of attorneys in inferior courts. They are to be Courts of record; but the petty sessions is not a *Court of record.* An attorney can only be appointed by matter of record. [*Parke*, J. What do you say to the court-baron?] Even in criminal proceedings an attorney may be appointed in all cases below treason and felony, but this is by the indulgence of the Court; *Bac. Abr.* tit. Attorney, B. [*Clinton.* That is because the indictee is under recognizance to appear *in person.*] Here, the public has no security for the appearance of the party charged, which makes this case stronger than where a recognizance has been entered into. This is a much graver offence than many cases of misdemeanor; yet in cases of misdemeanor, the indictee must appear in person, unless he is out upon bail. Here, no bail is given. [*Bayley*, J. Suppose you convict the party, what can you do? In cases of misdemeanor the defendant, upon conviction, is liable to immediate imprisonment.] It is submitted that the distinction cannot be taken between cases in which the proceeding is against the person, and where it is against the goods. Upon conviction for a misdemeanor in disturbing a meeting-house, there is no power whatever to proceed against the person; the sentence is limited to the imposition of a penalty of 20*l.* (*a*). It is true that in the present case the conviction is final. But that circumstance cannot form a ground of distinction. This is the only case in which a case may be brought directly into this Court, without going through the sessions. [*Bayley*, J. Now supposing there had been a right to appeal to the sessions in this case, how would the party have known whether he had any ground for appealing?] The evidence is set out, and appears upon the face of the conviction. [*Parke*, J. Suppose the party could not write, and that he wished to indict witnesses who had given false evidence against him? *Bayley*, J. If the party charged is not bound to attend *personally*, why should he not be allowed to appear by an

(*a*) Toleration Act, 1 *W. & M.* sess. 1, c. 18, s. 18.

attorney?] It is not contended that this is not a public court. [*Parke*, J. There are two statutes of *Elizabeth* authorizing the appearance of defendants by attorney to answer informations on penal statutes (*a*). The defendants seem to have considered, that if the party charged was not entitled to appoint an attorney, they had a right to turn the plaintiff out of the justice-room. Does that follow?]

Goulburn, Serjt. on the same side. The first point to be decided is, whether a party summoned to appear before magistrates is entitled to attend *accompanied* by an attorney. The next point is, whether, supposing him to be entitled to the assistance of an attorney, when he is himself present, he can refuse to appear in person, and send an attorney in his stead. In *Rex* v. *Justices of Staffordshire* (*b*), this Court held that an attorney has no right to be present on the hearing of an information *on the game laws*. But it is said that the rule laid down in *Cox* v. *Coleridge*, and in *Ferrand* v. *Garnett*, applies only to cases of preliminary inquiry. The reasoning of the judges in those cases is not confined to that narrow point. Lord *Tenterden*'s judgment in particular proceeds upon *general* principles. Though the act here complained of was done at petty sessions, it

(*a*) By 29 *Eliz.* c. 5, s. 21, after reciting that "divers her majesty's loving subjects, dwelling in the remote parts of this realm, are many times maliciously troubled, upon informations and suits exhibited in the Courts of K. B., C. P. and Exchequer, upon penal statutes, and are drawn up upon process out of the counties where they dwell, and desire to attend and put in bail, to their great trouble and undoings," it is provided and enacted, "that if any person or persons shall be sued or informed against, upon any penal law, in any of the several Courts of K. B., C. P., or Exchequer, where such person or persons are bailable by law, *or where by leave or favour of the Court* such person or persons, so to be impleaded or sued, shall and may, at the day and time contained in the first process served for his appearance, appear by attorney of the same Court where the process is returnable, to answer and defend the same, and not be urged to personal appearance, or to put in bail for the answering such suit." By 31 *Eliz.* c. 10, s. 20, this indulgence is limited to natural-born subjects and denizens.

(*b*) *Suprà*, 316.

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was not done by them *as sitting in petty sessions*. The question therefore is simply whether, when parties are summoned to appear before a justice of the peace, *any* person may come in and say that he is sent by the party summoned to appear in his stead. [*Bayley*, J. At present, I am disposed to think that this was a court at which every person had a right to be present. It is very desirable that the public should see what is passing in Courts of Justice. *Parke*, J. Especially where the same person is performing the functions of judge and jury.]

Cur. adv. vult.

On a subsequent day, the judgment of the Court was delivered to the following effect, by

BAYLEY, J.—The Court has already intimated an opinion upon the right of the public to attend upon the hearing of an information before magistrates, under a penal statute, and after having had an opportunity of giving further consideration to the subject, and of conferring with Lord *Tenterden*, we adhere to the opinion which in the course of the argument we threw out. One of the questions which the parties were desirous of agitating was—whether, upon a summary conviction under the game laws, the party informed against had a right to appear by attorney. In this case the party himself was not present, but he insisted upon a right to appear by his attorney. We do not think it at all necessary to give any opinion upon that point. Whether it may be matter of *right*, whether it may be matter of *indulgence* or not, or whether the magistrates have or have not a right to exercise a *discretion* upon that subject, are questions upon which we say nothing (*a*). The ground upon which our opinion is formed in the present case is, that the magistrates were proceeding in a case of summary conviction, and therefore exercising a *judicial* authority, constituting a court of justice for that purpose; and we are of opinion that it is one of the essential qualities of a

(*a*) Vide *Collier* v. *Hicks*, 2 Barn. & Adol. 663.

court of justice, that its proceedings should be public, and that all parties who are desirous of hearing what is going on have a right to be present, provided there be sufficient room for them, that no interruption is offered to the proceedings, and that no specific reason exists for their exclusion. Here, the defendant *Cooper*, and without any offence given by the plaintiff, ordered him to be turned out of the room. The plaintiff had come into the room as the friend of *Preston*, the party charged, but was entitled to be there as one of the public. As the friend of *Preston*, he might be desirous of knowing by what witnesses and by what evidence the information was supported; and it might be of great importance to *Preston*, with a view of ulterior proceedings, if the witnesses misconducted themselves and stated what was not true. *Preston* should have the opportunity of knowing what had been proved against him, and of calling the witnesses to account for that misconduct. The point which we decide is, that the magistrates, in the exercise of their duty, in summarily convicting, are a species of court, and exercise a judicial function, and that on this ground their proceedings ought not to be private, but public; and that therefore the removal of the plaintiff was not warranted. *Cooper* being the only defendant who interfered in turning the plaintiff out of the room, in which transaction the other defendants took no part, the verdict ought to stand against *Cooper* only; and a verdict ought to be entered in favour of the other two defendants.

Postea to the plaintiff (*a*).

(*a*) The verdict in this case being under 40*s.*, and the learned judge before whom this cause was tried not having certified under 22 & 23 *Car.* 2, c. 9, s. 136, the Master refused to allow the plaintiff any further costs than 1*s.*, that being the amount of the damages found by the jury. A rule having been obtained on behalf of the plaintiff, calling upon the Master to review his taxation,

Adams, Serjt., in shewing cause, relied upon the 22 & 23 *Car.* 2, c. 9, s. 136, which enacts, "that in all actions of trespass, assault and battery, and other personal actions, wherein the judge at the

In trespass for turning the plaintiff out of a room per quod he was prevented from exercising his business of an attorney therein, if the plaintiff obtain a verdict for less than 40*s.* he is not entitled to full costs without a judge's certificate, under 22 & 23 *Car.* 2, c. 9, s. 136.

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trial of the cause shall not find and certify under his hand, on the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of 40*s.*, shall not recover or obtain more costs of suit than the damages so found shall amount to; and if any more costs in any such action shall be awarded, the judgment shall be void, and the defendant is hereby acquitted of and from the same, and may have his action against the plaintiff for such vexatious suit, and recover his damages and costs of such his suit, in any of the said Courts of record."

Denman and *Clinton*, contrà. The plaintiff is entitled to full costs. The action was brought not for the assault and battery only, but also for preventing the plaintiff from exercising his profession. [*Bayley*, J. That is only laid as a *consequential* damage.] Where the consequential damage would of itself support an action, the plaintiff is entitled to full costs without any certificate. In *Anderson* v. *Buckton*, 1 Stra. 192, which was an action of trespass, for entering with diseased cattle upon the plaintiff's land, whereby his cattle were infected, upon not guilty pleaded, a verdict was found for the plaintiff, damages 20*s.*, and it was said by the Court, "The true distinction is, where the matter alleged by way of aggravation, will entitle the party to a *distinct satisfaction*, he is entitled to full costs." In *Carruthers* v. *Lamb*, Barnes, 120, which was trespass for an assault and tearing the plaintiff's clothes, it was held that the plaintiff was entitled to full costs, although the damages were under 40*s.*

Lord *Tenterden*, C. J.—In *Carruthers* v. *Lamb*, the tearing of the clothes was laid as a distinct trespass, and not as an aggravation of the assault. I certainly was not aware of the case of *Anderson* v. *Buckton*, nor can I consider it as good law. It has never been acted upon or referred to in modern books of practice. (But see Hull. Costs, 2d ed. 71.) There is hardly any action of trespass without a per quod the plaintiff was put to expense, &c. &c. The general opinion has been, that if the consequential damage is laid as an aggravation of the trespass, and the verdict is under 40*s.*, the plaintiff can recover no more costs than damages, and in that opinion I fully concur.

Bayley, J.—Where less than 40*s.* damages are found in actions for slander with special damages, and the words are actionable in themselves, and the damages are less than 40*s.*, the plaintiff cannot recover more costs than damages, but if the words are actionable only in respect of the special damage, the plaintiff is entitled to full costs. So in an action for a trespass accompanied with special damage, if the verdict be under 40*s.* the costs cannot exceed the amount of the damages found by the verdict.

Littledale, J. concurred, and referred to *Bannister* v. *Fisher*, 1 Taunt. 357.

Rule discharged.

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POWER and another, Assignees of FULTON, *v.* BUTCHER and CAPET.

ASSUMPSIT, upon an indebitatus to *Fulton* before his bankruptcy for work and labour, in making out policies of insurance and effecting insurances,—for money paid for premiums,—and for money due to *Fulton* in respect of his having underwritten and procured to be underwritten divers policies of insurance for the defendants. The declaration also contained counts for premiums paid for insurances, for work and labour, for money paid, for money had and received, and upon an account stated with *Fulton* before his bankruptcy.

Both the defendants pleaded the general issue.

Butcher (*a*) pleaded further, that in Easter term, 1827, the plaintiffs impleaded him on the same causes of action; that in Trinity term, 1827, he pleaded the general issue in that action; that in the same term he obtained a rule to pay 5*l.* 15*s.* into Court; that this sum was accordingly paid into Court; that under that rule the plaintiffs' costs were taxed at 8*l.* 5*s.* 6*d.*; that the plaintiffs agreed with *Butcher* to take the 5*l.* 15*s.* out of Court under the rule; that *Butcher* paid the 8*l.* 5*s.* 6*d.* costs to the plaintiffs, *who accepted and received of Butcher the* 5*l.* 15*s.* *and* 8*l.* 5*s.* 6*d.* *costs, in satisfaction and discharge of the causes of action mentioned in the declaration in that cause.* Averment: that the causes of action are the same, and that the money now sought to be recovered might have been recovered in the former action.

Replication: that the plaintiffs did not agree to take

By the custom of *Lloyd's*, premiums of insurance are matters of account between the underwriter and the broker, and between the broker and the assured, without any privity between the assured and the underwriter. The broker has therefore a claim upon the assured for the amount of the premium as soon as the policy is effected, whether he has paid the underwriter or not,—and whether the underwriter has, by the policy, confirmed the premium to be paid; or has taken the covenant of the broker to pay it.

In assumpsit, the defendant pays money into Court, and the plaintiff agrees to take the money and his costs. The costs are taxed, and paid by the defendant and received by the plaintiff. The plaintiff, altering his mind, does not take the money out of Court, and offers to return the costs, which the defendant refuses to take. The plaintiff discontinues the action, and the costs of the discontinuance are taxed and paid to the defendant. These facts will not support a plea in another action for the same demand, alleging that the plaintiff received the money paid into Court, and the costs, in full discharge of the cause of action.

(*a*) It would seem that both the defendants might have joined in this plea; for though in the former action *Butcher* was the only party sued, the cause of action would be discharged, if at all, against *both*.

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the said 5*l.* 15*s.* out of Court under the rule, and did not accept and receive the 5*l.* 15*s.* with the costs in satisfaction and discharge of the causes of action mentioned in the said declaration. At the trial before Lord *Tenterden*, C. J., at the sittings at Guildhall after Michaelmas term, 1828, a verdict was taken for the plaintiffs, subject to the opinion of this Court upon the following case:—

Fulton, an insurance-broker, carrying on business at *Lloyd's* coffee-house, was employed by the defendants to effect, and did effect for them, policies of insurance, at the premiums mentioned in the following account:—

	£.		£. s.	£. s.
October 22, 1825, Insurance .	3000	Huntcliffe at	12 0 ..	360 0
——— . . .	600	———	2 5 ..	13 10
November 2, . . .	2000	Julius Cæsar	12 0 ..	240 0
——— . . .	100	Fame .	1 5 ..	1 5
November 14, . . .	300	St. Lawrence	1 10 ..	4 10
——— . . .	500	Fame . .	1 10 ..	7 10

The policies, which are under the seals of two directors of, and were effected by *Fulton* with, the Indemnity Mutual Marine Assurance Company, recited that *Fulton*, upon his representing that he was interested in, or duly authorized as owner, agent, or otherwise, to make assurance upon, the vessels mentioned in each policy, and desirous of making such assurance, had covenanted with the Company to pay them the premiums. The names of the defendants do not appear in the policies. *Fulton*, who was a member of the Company, paid the Company 1*l.* 5*s.* and 4*l.* 10*s.* in respect of the policies of 100*l.* on the Fame and of 300*l.* on the St. Lawrence, but has not paid any of the other premiums. The defendants never were members of the Company.

The commission in respect of the policies amounts to 31*l.* 1*s.*, which *Fulton* would have been entitled to deduct and retain from the premiums.

In 1826, the plaintiffs being ignorant of the joint liability of *Capet*, commenced an action for the amount of the premiums against *Butcher* alone.

Trinity term, 1826, *Butcher* pleaded the general issue.

1st June, 1826, *Butcher* paid 5*l.* 15*s.*, the amount of the premiums of the Fame and of the St. Lawrence, into Court, under the recent rule. The plaintiffs' costs, up to the time of paying the money into Court, were taxed at 8*l.* 5*s.* 6*d.*

2d June, 1826, the plaintiffs received their taxed costs aforesaid, but the money paid into Court was not, though it might at any time afterwards have been, taken out of Court by the plaintiffs.

3d January, 1828, the plaintiffs' attorneys gave notice to *Bell*, (*Butcher*'s attorney,) that he would not take the sum of 5*l.* 15*s.* out of Court, but that he should take out a rule to discontinue on payment of costs; and at the same time left at *Bell*'s office 8*l.* 5*s.* 6*d.*, which had been received as before mentioned, as the costs incurred by the plaintiffs up to the time of paying money into Court, but which *Bell* refused to accept as a repayment of the said costs.

1st February, 1828, a rule was taken out by the plaintiffs to discontinue the action against *Butcher* on payment of costs. A copy of this rule was served on *Bell* with three appointments to tax; *Bell* not attending these appointments, the master marked the costs of such defaults at 3*s.* 4*d.*

2d February, 1828, the plaintiffs' attorneys received from *Bell* the following note:—

"Gentlemen,—Mr. *Bell* will feel obliged by your letting the appointment to tax these costs stand over till after the term, he being very busy now."

To this proposal the plaintiffs' attorneys assented, and in May following *Bell* delivered to the plaintiffs' attorneys a bill of costs from the beginning of the action, as upon a rule to discontinue. This bill amounted to 18*l.* 12*s.* 4*d.* From this 16*s.* 8*d.* was deducted on taxation, which taxation *Bell* attended, and the balance was on the 13th May paid to *Bell* by the plaintiffs' attorneys.

The Company knew soon after the bankruptcy of *Fulton*, that the policies had been effected by him on behalf of the defendants, and proposed that the defendants should pay the premiums remaining due.

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The question for the opinion of the Court is, whether the plaintiffs are entitled to recover the whole or any part of the 621*l.* 10*s.* (*a*)

R. V. Richards, for the plaintiffs. In this case two questions arise: first, whether the plaintiffs would be entitled to recover, supposing the former action had not been brought: and if so, secondly, whether the proceedings in the action against *Butcher* are a bar to the present action.

This action is brought in form by the assignees of an insurance-broker, but in substance it is the same as if the broker himself were the litigating party. An insurance-broker may sue the assured for the amount of the premiums, although he may not have paid those premiums to the underwriter, according to the practice at *Lloyd*'s. The present case, however, differs from the common form. Here the contract is under seal, and contains no direct acknowledgment of the payment of the premiums, but a covenant is taken from the broker that he *will* pay the premiums. In *Dalzell* v. *Mair* (*b*) it was held, that in an action by the assured against an underwriter for a return of the premium, the policy, whereby the underwriters confessed themselves paid the consideration due unto them for that assurance by the assured, was conclusive evidence of the receipt of the premium by the defendant. That case, it must be admitted, differs from the present, as there can be no estoppel here arising out of conclusive evidence of payment. Lord *Ellenborough*, however, in giving judgment, says, "it is well known that there are running accounts kept between the insurance-broker and the underwriter;

(*a*) At the conclusion of the case it was stated that it had been agreed "that the Court should be at liberty to draw any conclusion from the facts stated, which a jury ought to have drawn." The Court always has this power upon a special *case*, though it is otherwise upon a special *verdict*. But the Court has, of late, frequently said that conclusions of fact ought to be stated in special cases, and that they ought not to be called upon to decide both on the law and the fact.

(*b*) 1 Campb. 532.

and Lord *Kenyon* held that the former, before paying the premiums to the latter, might maintain an action against the assured to recover the amount of them as for *money paid.*" In *Airy* v. *Bland* (*a*), Lord *Mansfield* allowed the assignees of a broker to recover premiums which the latter had not paid. The opinion of Lord *Ellenborough* in *Dalzell* v. *Mair*, and that of Lord *Mansfield* in *Airy* v. *Bland*, are decisive to shew that if no covenant had been taken in this case, the defendants would have been liable to pay the premiums to the bankrupt. It is evident how the difference arises between the case of premiums of insurance and other cases where no action for money paid will lie without proof of actual payment. It will be said that the difference arises from the recital of the payment contained in the policy, but in an action against the assured they would not be bound by the acknowledgment made by the underwriter. The true ground of distinction is this, that the insurance-broker is the *agent* of both parties; in respect of the premium he is the agent of the underwriter. In *Minett* and another, assignees of *Barchard* v. *Forrester* (*b*), Sir *James Mansfield* in delivering the judgment of the Court, says, "The broker is agent for the assured, and also for the underwriter; he is agent for the assured, first, in effecting the policy, and in every thing that is done in consequence of it; then he is agent for the underwriter as to the premium, but for nothing else; and he is supposed to receive the premium from the insured for the benefit of the underwriter, but the whole account with respect to the premium after the insurance is effected, remains a clear and distinct account between the underwriter and broker. Exclusive of fraud and other similar circumstances, there is an end of every thing with respect to the premium, I mean between the insurer and the insured. The insurer, with respect to the insured, is supposed to have received the premium; the broker in fact gives the underwriter credit for it in his books, and the underwriter debits the broker for the amount of

(*a*) Marsh. Insurance, 309. (*b*) 4 Taunt. 541 n.

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the premium in his books, and there is a running account between them." If the Court should hold that the practice at *Lloyd's*, in the cases cited, ought to be discontinued, a difficulty would arise to the underwriter in obtaining payment? In *De Gaminde* v. *Pigou* (*a*), it was held, that an underwriter sued by the assured for a loss, could not set off the amount of the premium, although such premium had never been paid. In *Grove* v. *Dubois*, *Buller*, J., said that it made no difference, whether at the time of the policy the underwriter knew the principal or not, and that he gave credit only to the broker. In *Edgar* and another, assignees of *Earden* v. *Fowler*, it is considered as acknowledged law, that the underwriter may sue the broker. It follows that the assured cannot be sued by the underwriter, but must be liable to the broker. This is much stronger than the ordinary and common case. Ordinarily the underwriter cannot be sued, because credit is given him by the broker—that is merely an inference.

Here, the underwriters have taken a *covenant* under seal. They not only give credit to the broker, but they obtain from him a security of a higher nature. This is much stronger than the ordinary case, for this reason, that *Fulton* was a member of the Company. [*Bayley*, J. It does not appear that a member was, by the rules of the society, entitled to effect insurances upon property not being his own.] Such insurances were allowed to be made. *Foy* v. *Bell* (*b*), and *Mavor* v. *Simeon* (*c*), will perhaps be relied on by the defendant; but those cases were decided on the ground of *fraud*. [*Parke*, J. The case might be put thus:—The broker has done more than is usually done, he has given the defendants the full benefit of the insurance, he has performed a service, in the course of which he has entered into a covenant and discharged the assured from their liability to pay the premium to the underwriters, and they are in the same situation as if the premiums were actually paid.] The broker never has paid and never can pay, and the assured

(*a*) 4 Taunt. 246. (*b*) 3 Taunt. 493. (*c*) Ibid. 497.

would ride off without any payment. [*Littledale*, J. The particulars contain no specific claim for the 31*l.* 10*s.*] The 31*l.* 10*s.* is contained in the premium, and would be a deduction to be made by the underwriters out of the premiums in favour of the broker or his assignees.

II. It is contended that what took place in the former action was a bar to any further proceedings. If the money had been paid and nothing further had been done, the former action might have been a bar. The payment, however, has been long since waived. That took place in June, 1827. In January, 1828, the rule to discontinue was served. If the defendants had meant to insist that the previous payment had put an end to the action, they should have repudiated the rule to discontinue. They should not have acquiesced in it, and taxed and received their costs. So far from *repudiating* the rule to discontinue, they write in February to request a postponement of the taxation. It does not stop there. *Bell* attends the taxation. But if the money had even been taken out of Court by the plaintiffs, the subsequent proceedings would have set the matter at large. [*Parke*, J. That should have been replied.] The whole matter was in fieri. Nothing was taken *in satisfaction* of the former debt. A former judgment is no bar where the plaintiff sues upon two causes of action and recovers upon one only; *Seddon* v. *Tutop* (*a*). It is otherwise if the demand is one and the same in both actions. [*Parke*, J. Does not your replication admit that the causes of action are the same?]

Broderick, contrà. The principle is not disputed, that an action cannot be maintained for money paid where no money has been paid; but it is said that though this is so in general, it is not so here. It has however been held, that

(*a*) 6 T. R. 607, and 1 Esp. N. P. C. 401. And see M. 11 R. 2, Fitz. Abr. *tit.* Trespass, pl. 207; *Lacon* v. *Barnard*, Cro. Car. 35; Winch, Ent. 62, 99; *Kitchen* v. *Campbell*, 3 Wils. 304, and 2 W. Bla. 827; *Bradford* v. *Bryan*, Willes, 268, and 7 Mod. 349; *Ravee* v. *Farmer*, 4 T. R. 146; *Smith* v. *Johnson*, 15 East, 213.

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an *agreement to pay* is not sufficient to support such an action. In *Taylor* v. *Higgins* (*a*), a note had been received in payment and satisfaction. [*Bayley*, J. Does it appear that the Court considered that the principal was discharged?] *Maxwell* v. *Jameson* (*b*). Where an agent intervenes, he *always* acts for both parties. The intervention of an agent is therefore not the true ground upon which the assured is discharged from his liability to pay the premium to the underwriter, in the case of an ordinary policy. The true ground of his discharge is the *estoppel* arising out of the *receipt*. [*Parke*, J. Here, the underwriter insures in consideration of a *covenant*, and not in consideration of *money*.] The case of an ordinary policy is an exception from the general rule, which does not apply here. It is not pretended that in this case there was a running account between the broker and the underwriters. *Airy* v. *Bland* does not go the length which has been contended. *Andrew* v. *Robinson* (*c*). [*Bayley*, J. It is material to consider whether the underwriters could have called upon the defendants for payment of the premium.] They were not estopped by what had taken place between them and the broker. In *Paterson* v. *Gandasequi* (*d*) it was held, that if at the time of a contract made by an agent, the principal is unknown, the other party may, as soon as the principal is discovered, sue either the principal or the agent—at his election. Here, the underwriters made their demand upon the assured, as soon as they were known. But supposing that the underwriters could not recover against the defendants, it does not follow that the assignees of a broker are entitled to recover in the present state of things. The assignees of the broker may pay the premiums to the underwriter and then sue the assured. The plaintiffs are proceeding against the defendants for money paid, and not for work and labour done by the bankrupt. The commission of 31*l.* 10*s.* is payable by the Company. Between the Company and the

(*a*) 3 East, 169.
(*b*) 2 Barn. & Alders. 51.
(*c*) 3 Campb. 199. And see *Wilkinson* v. *Clay*, 6 Taunt. 110, and 4 Campb. 171.
(*d*) 15 East, 62.

bankrupt it is a partnership transaction. [*Parke*, J. Although the bankrupt be a partner, yet if he enters into a covenant with his partners he may be sued upon such covenant. The broker says to the assured, "I have got the policy underwritten, which is as valuable as if the premium had been actually paid."] Where no money passes for effecting a policy, it is difficult to say how much the broker is entitled to receive.

The issue raised by the replication is found for the defendant. [*Bayley*, J. The *5l.* 15*s.* was never received by the plaintiffs. There was no entry on the record to shew that the suit was put an end to.] The taxation of costs is as between these parties tantamount to an actual receipt and acceptance of the money. If the plaintiffs relied upon any thing which took place afterwards, they should have replied such matter specially. The officer signs the receipt, and after the taxation of the costs he becomes, in respect of the money paid in, the agent and banker of the plaintiffs, who are therefore in the same situation as if the money were in their own possession.

Richards, in reply. It is said that the discharge of the assured from the premium in the ordinary case arises from the language of the receipt. [*Parke*, J. And the account between the broker and the underwriter.] No such estoppel can arise where the action is not against the underwriter. [*Littledale*, J. Could not a count have been framed to meet the facts of this case?]

BAYLEY, J.—I am of opinion that the plaintiffs are entitled to recover the whole sum claimed in this action, which is brought by the assignees of *Fulton*, an insurance-broker, for work and labour, and premiums, against shipowners, by whom *Fulton* was employed to effect certain policies with a company of which he was a member. Generally speaking, according to the course of business, the assured does not himself pay the premiums immediately to the broker, nor the broker to the underwriter, but it is con-

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sidered as if they were paid *instanter*. The underwriter looks for payment to the broker, not to the assured, of whom he often knows nothing. The broker is the party who, *as principal*, is to receive of the assured, and pay to the underwriter. The policy in the present case departs from the ordinary form. The policy is by deed, and by it the underwriters take the broker's covenant to pay the premiums. This action is brought on the ground that the broker was entitled to call upon the assured for payment of the premiums. If the assured are not liable to be called upon by the underwriters, the failure of the broker could not destroy the right to call on the assured. It seems impossible to say that the underwriter has any claim on the assured. In ordinary cases the underwriters would not have any claim, because, by the form of the policy, they would have confessed that the premiums had been paid. No promise can be raised by *implication* where the parties have entered into an *express* contract. Here (*a*), there is an express covenant. The assured has the same benefit as if money had been advanced by the broker on his account. If the defendants cannot be called upon to pay the underwriters; they ought to pay some one. The broker, if he has assets, is liable to the underwriter for the full amount of such premiums, and his estate is now liable for the full amount of such premiums. A difficulty arises upon the form of the action, whether it is rightly brought or misconceived. This cannot be treated as money paid. Though the assured are no longer liable to the underwriters, yet in point of fact the premiums have not been paid to the underwriters. A case has been put by Mr. *Richards*, where notes were considered as money. Here nothing is paid, but security is given. If the 62*l.* had been paid, the broker would have been entitled to deduct 31*l.* 1*s.* This 31*l.* 1*s.* would be considered as compensation for the broker's trouble. The count for work and labour clearly covers this part of the demand. With respect

(*a*) No promise however was here sought to be *implied* between those who were *parties* to the *express* contract.

to the grounds on which the plaintiffs are entitled to the residue. In the latter part of the first count, the words "underwritten and subscribed" may be rejected, and if enough remains, the plaintiffs may recover upon the words "cause and procure to be underwritten." The plaintiffs are not bound to prove the entire count. These latter words seem fairly and exactly to meet this case.

Upon the special plea, the affirmative lies on the defendants. In that plea it is alleged, that not only the 8*l.* 5*s.* 6*d.* but also the 5*l.* 15*s.* were accepted and received by the plaintiff. In fact the 5*l.* 15*s.* remained in court. There may be cases in which the money brought into Court would be at the risk of the plaintiff, in case he refused to take it out after receiving the costs. But the payment into Court is not *of necessity* payment to the plaintiff. If the plaintiffs abandon the claim and discontinue the action they are at liberty to do so. I do not think that the money paid into Court was effectually received by the receipt of the taxed costs.

LITTLEDALE, J.—The first point is, whether the plaintiffs have *launched* themselves, and have made out a case to recover any thing. The term "insurance" in the particulars of demand may mean any thing to which the broker was entitled by reason of his having effected these policies. The 31*l.* 1*s.* commission, I think, may be recovered, inasmuch as the broker was entitled to retain it out of the premiums which he had covenanted to pay. In the common form of a policy the broker is entitled to recover against the assured by usage, otherwise it would be difficult to say that the principle was well founded. Here, instead of being liable to pay over the premiums to the underwriters, as matters of account, the broker has bound himself by covenant to pay those premiums to the underwriters. If the premiums had been actually paid, the assured would have been bound to repay the amount. Here, they are not actually paid, but by the usage they are to be considered as

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paid; and I think the plaintiffs might have declared as upon a special undertaking to indemnify *Fulton* against his covenant. I have no doubt whatever that if a special count, stating the form of the policy; and that *Fulton* had covenanted at the request of the assured, and a promise to pay the broker before actual payment by him to the underwriters, would have been supported by the usage. I will not, however, say that the count in the present action is bad, as my learned brothers are against me. In the first count, the claim for work and labour is confined to commission, and for divers sums of money before that time advanced and paid by *Fulton* for the defendants, at their request, to divers persons, as and for certain premiums and rewards for underwriting and subscribing the said policies. Then comes the part upon which the plaintiffs are said to be entitled to recover, "and for divers sums of money due and payable to *Fulton*, for and in respect of *Fulton's* having before then underwritten and subscribed, and caused and procured to be underwritten and subscribed, divers policies of insurance for the defendants at their request." That part of the count cannot be separated, because it has no meaning apart from the rest. It appears to me that the words "divers premiums" can apply only to policies underwritten *by the plaintiff*—which are out of the case. The amount may in some sense be said to be due to *Fulton*, but it is not a direct debt due from the defendants to *Fulton*. If this objection prevailed, the assignees would have to bring another action.

There would have been evidence to go to a jury that the plaintiffs chose to leave the money in Court, and that is the same thing as if they had actually received the money. Afterwards the plaintiffs take out a rule to discontinue on payment of costs;—the costs are taxed and paid;—the defendant *Butcher* assents to the discontinuance. It is said that the plaintiffs ought to have *replied* the waiver. It seems to me that that was unnecessary. If the fact had been that the two sums had been accepted and received in

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full satisfaction, and the plaintiffs had afterwards discontinued the action, it would have been necessary to reply the waiver. Here, the acquiescence in the discontinuance is no otherwise material than as forming some evidence that the plaintiffs never intended to take the money in full satisfaction.

PARKE, J.—I am of opinion that the action cannot be maintained for money paid. Without proof of payment, or of that which is equivalent to payment, no action for money paid can be maintained; *Taylor* v. *Higgins* (*a*), *Maxwell* v. *Jameson* (*b*). In the case of an ordinary policy, it has been held that an action for money paid lies, but that rests upon two grounds, which do not occur in the present case. First, the receipt as for money paid,—and, secondly, the passing the amount in account, the effect of which may be to entitle the broker to treat the amount of the premiums as money paid by him to the underwriter, and *re-lent* to him. In the ordinary case, the claim for money paid rests on the form of the policy, (which contains an acknowledgment of the payment of the premium,)—and on the account between the broker and the underwriter. Neither that form nor the account are to be found in the present case. The plaintiffs could no doubt recover 31*l.* 1*s.* for work and labour. The plaintiffs claim in respect of divers policies of insurance which *Fulton* had caused and procured to be underwritten and subscribed. He has caused them to be underwritten and subscribed in as beneficial a manner for the defendants, as if the premiums had been actually paid to the underwriters. The declaration would, perhaps, have been better in a different shape. If it had contained a special count, such count would have been on the implied undertaking to indemnify the broker against his covenant; if an indebitatus count had been framed to meet

(*a*) 3 East, 169; *et vide suprà*, 334.

(*b*) 2 Barn. & Alders. 51; *suprà*, 334.

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the circumstances of the case, it would have been a count for work and labour bestowed by the bankrupt in effecting the policies. The objection only amounts to an imperfection in the description.

The plea is, in substance, a plea of payment and acceptance in satisfaction (*a*). If the payment of the money into Court operated of itself as a discharge, the defence should have been so pleaded. Under the present plea, the defendant has undertaken to shew that the plaintiffs actually received the money. If the defence of a discharge by payment of the money into Court, is to be considered as having been given in evidence by the defendants under the plea of the general issue, non assumpsit(*b*), what took place after the alleged payment would amount to a complete waiver of such a defence.

Postea to the plaintiffs.

(*a*) And see *Francis* v. *Crywell*, 5 Barn. & Alders. 886; *S. C.* by its proper title of *Francis* v. *Crysell*, 1 Dowl. & Ryl. 546.

(*b*) Payment made and accepted in satisfaction, whether made by one or by all of several promisors, might, previously to the Rules of H. T. 4 *W.* 4, (which see 3 Nev. & Mann. 7,) have been given in evidence under the general issue, non assumpsit. After those rules had come into operation, such a defence must have been pleaded specially. It would not, however, have been necessary to confine the defence, as was done here, to the exoneration of the party making the payment, as the acceptance in satisfaction would discharge the cause of action as against all the promisors.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

HILARY TERM,

IN THE TENTH YEAR OF THE REIGN OF GEORGE IV.

MEMORANDUM.

IN the course of last Vacation the Honourable Sir *James Burrough*, Knt. resigned his office of one of the Justices of the Common Pleas (*a*).

In the course of this term he was succeeded by Mr. Serjt. *Bosanquet*, who took his seat on the bench on the 3d of February, and afterwards received the honour of knighthood.

(*a*) To which he had been appointed in Easter term, 1816.

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A. devises land to *B.* and his heirs, but in case *B.* dies without heirs, then to *C.* and his heirs, or in case *B.* offers to mortgage or levy a fine, or suffer a recovery, upon the whole or any part thereof, then to go to *C.* and his heirs—*B.* and *C.* are strangers in blood. The fee vests in *B.*, and the executory devise to *C.* is void.

BY an order of Sir *L. Shadwell*, V. C., a case was stated for the opinion of this Court upon the construction of the following devise in the will of one *William Reynell*: "All the rest, residue, and remainder of my personal estate and lands in South-Tawton and in Sampford-Courtenay, I give unto *Richard Ware*, and to his heirs for ever; but

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in case *Richard Ware* dies without heirs, then to *John Powlesland* and his heirs; or if in case *Richard Ware* offers to mortgage or suffer a fine or recovery upon the whole or any part thereof, then to go to the said *John Powlesland* and his heirs." *Powlesland* was a stranger in blood to *Ware*.

The questions stated for the opinion of this Court were—

First: What estate and interest *Ware* took.

Secondly, Whether, if *Ware* conveyed a part of the devised lands to a purchaser in fee, the purchaser's title could be affected by *Ware's* afterwards mortgaging the residue, or levying a fine, or suffering a recovery thereof.

Thirdly. Whether, if *Ware* conveyed the whole of the devised lands to a purchaser in fee, the purchaser would have a good title to the fee against all persons claiming under the will (*a*).

W. Rogers for the plaintiff. Two principal questions are raised,—the first is, whether *Ware* took an estate tail or a fee. This is disposed of by the fact stated—that *Powlesland*, to whom an estate is limited after a devise to *Ware* and his heirs, was a stranger in blood to *Ware*. [*Parke*, J. That point was abandoned in the Court of Chancery.] If that point was abandoned, it will still be necessary to send a special certificate stating such abandonment, *Right* v. *Hamond* (*b*). The point is rendered so clear, that in *Tilburgh* v. *Barbut* (*c*), the Court would not allow it to be argued.

The second point is one of greater importance. The estate is given over not upon alienation, but if the tenant *offers* to mortgage, &c. It is a clear established principle,

(*a*) Lord *Tenterden*, C. J., observed, that the 2d and 3d questions were not properly raised,—that it was irregular to propound *speculative* questions for the opinion of the Court,—and that the case sent by the Vice Chancellor should have stated the *facts* out of which those questions arose.

(*b*) 1 Stra. 489.

(*c*) 1 Ves. sen. 89.

that though a restriction upon an *act* may be good, yet a restriction upon an *offer* to do something, is too vague; According to the old cases, this is not an issuable fact; *Pierce* v. *Win* (*a*). In that case, the devise over was directed by the will to take effect, in case the devisee in tail should "go about or attempt to alien or sell the said messuages, &c.;" and it was held that a feoffment by the devisee in tail did not make his estate void. The distinction as to the validity of conditions prohibiting attempts to do an act, and of those which prohibit the act itself, is clearly laid down in *Mildmay's* case (*b*). In *Bradley* v. *Peixoto* (*c*), the words of the condition were very similar to the present, but the Master of the Rolls held that the condition was of no effect (*d*). There is no case where a condition restraining a rightful alienation has been sustained. But an alienation by an infant may be restrained; so, a fine by tenant in tail, because it is a wrongful conveyance, which not only destroys the estate tail, but also devests the reversion and the remainder, if any (*e*). [*Bayley* J. Tenant in tail cannot be restrained from suffering a recovery.] Because that is a *rightful* conveyance. In the present case, the restriction against levying a fine is void, because that is a lawful conveyance for tenant in fee simple. Upon the grant of a manor in fee, the grantee cannot be restrained from making grants of copyholds. [*Bayley* J. A copyholder has a right vested in him.] The condition would be void though it merely re-

(*a*) 1 Ventr. 321, and 3 Keble, 787. *Pollexfen* has reported the case more fully, and has stated his own argument at length; but he has not given the judgment of the Court. Poll. Rep. 435.

(*b*) 6 Co. Rep. 40.

(*c*) 3 Vesey, jun. 324.

(*d*) In *Bradley* v. *Peixoto*, the words were "I will and most strictly ordain, that if my wife or any one of my children shall attempt to dispose of all or any part of the bank stock, such an attempt shall exclude them, him, or her from any benefit in this will, and shall forfeit the whole of thei share, &c." Nothing turned in that case upon the distinction between the *act* and the *attempt*.

(*e*) As to the effect of fines and recoveries in devesting estates, see the notes to *Doe* d. *Cooper* v. *Finch*, 1 Nev. & Mann. 130.

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strained the lord from regranting after the *escheat* of a copyhold. *Littleton* says, sec. 360, "If a feoffment be made upon such condition,—that the feoffee shall not alien the land to any one, this condition is void, because, when a man is infeoffed of lands or tenements, he has power by law to alien them to any person." And, s. 361, "But if the condition be such,—that the feoffee shall not alien to such a one, naming him, or to any of the heirs or issue of such a one, &c., which conditions do not take away all the feoffee's power of alienation, such condition is good." Also, s. 362, "If tenements be given in tail upon such condition, —that the tenant in tail and his heirs shall not alien in fee, or in tail, or for the term of any other life except their own, such condition is good." Upon which Lord *Coke* says, "And therefore, if a gift in tail be made upon condition that the donee, &c. shall not alien, the condition is good to some intents and void to some; for, as to all those alienations which amount to any discontinuance of the estate tail, or are against the statute of Westminster 2 (*a*), the condition is good without question, but as to a common recovery, the condition is void, because this is no discontinuance, but a bar, and this common recovery is not restrained by the said statute, and therefore such a condition is repugnant to the estate tail." Here, the devisee is restrained from mortgaging, levying a fine, or suffering a recovery, all which are lawful conveyances for tenant in fee simple. A condition requiring the tenant in tail not to lease for his own life is void, *Sheppard's Touchstone*, 133. In *Doe* d. *Mitchinson* v. *Carter* (*b*), Lord *Kenyon*, in giving the judgment of the Court, says, "A grantor, when he conveys an estate in fee, cannot annex a condition to his grant—not to alien; nor, when he conveys an estate tail—a condition not to bar the entail. Such restrictions are imposed to prevent perpetuities." The same rule was laid down and acted upon by *Grant*, M. R., in *Bradley* v. *Peixoto* (*c*);

(*a*) 13 Edw. 1, c. 1, (the statute *de donis*.)

(*b*) 8 T. R. 57.

(*c*) 3 Vesey, jun. 324.

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Ross v. *Ross* (*a*), is another authority to the same effect. [Here he was stopped by the Court.]

Preston, contrà. The first point, namely, as to the quantity of estate which passed to *Ware* by the devise, is quite settled: it is too clear to be disputed. But there is a shorter answer. This is not a condition, but a conditional limitation, an executory devise. [*Bayley*, J. Who is the executory devisee?] The person who would take the remainder, supposing the estate limited to *Ware* had been an estate tail. It may be doubted whether *Littleton* has not stated the rule too broadly. A restraint is not void, if imposed for a reasonable time or the life of the party. It is conceded, that a man may annex a restraint upon alienation to a particular estate. The condition cannot be considered as repugnant to the estate conveyed, except in the case of an estate tail or an estate in fee. The real ground upon which conditions prohibiting *attempts* at alienation are void, is, that where you cannot restrain the alienation itself, you cannot restrain the attempt, and thereby produce the same effect in defeating the alienation. *Bradley* v. *Peixoto* and *Ross* v. *Ross* cannot govern the present case, because those were cases of *personal* estate, which is governed by the civil law, *Beachcroft* v. *Broome* (*b*). Every testator who has devised a fee may affix a qualification, (the benefit of which he may reserve to his heirs, or give to strangers,) by way of executory devise. The king may impose a restriction upon his grants, prohibiting alienation generally, even at the present day, *Com. Dig.* Condition, (D.) His power of imposing such a restriction is derived, not from his prerogative, but from his interest in the estate. Here, there are two limitations, one of which is admitted to be void; the second is good as an executory devise. The testator might have good reason for restraining his devisee from executing a mortgage. He might say, I will not give

(*a*) 1 Jac. & Walk. 154. (*b*) 4 T. R. 441.

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my estate to a man who would be such a fool as to mortgage it. Then there is not an absolute restraint upon an alienation. It is open to the party to convey by feoffment, or by lease and release. If the testator had said that the estate should go over upon the party's going to the top of St. Paul's, such a limitation would have been good.

The next question is, whether the mere *offer* to mortgage is open to the objection which has unexpectedly been taken. It is said, that an attempt cannot be put in issue. That may have been law in the reign of Elizabeth, but cannot be so in that of George the Fourth. What is said in *Mildmay's* case must be taken *cum grano salis*, and with reference to the restriction then under the consideration of the Court. What is an *offer* is matter of evidence for a jury. If a man actually mortgage, it cannot be doubted but that he has *offered* to mortgage. If a bribe is offered to a voter, the crime is complete, although the bribe be not accepted (*a*). *Ware* took an estate in fee, subject to an executory devise,—and that devise over is lawful, reasonable, and, depending upon a fact, capable of trial.

Rogers in reply. A man cannot convey property and withhold the *incidents* to that property. An act which cannot be restrained by condition cannot be restrained by an executory devise over, where the condition would be contrary to law, *Shepp. Touchst.* 133. In one of the cases referred to by Lord *Coke*, in the margin of *Co. Lit.*, namely, 13 *H.* 7, 23 (*b*), the Court would not hear it argued

(*a*) *Vide tamen Henslow* v. *Fawcett*, 4 Nev. & Mann. 585.

(*b*) P. 13 H. 7, fo. 22, 23, pl. 9. That was a case of formedon in the remainder, in which the tenant pleaded that his ancestor was seised and gave the manor in tail, remainder to the right heirs of the donee, upon condition that if the donee, or any of the heirs of his body, should alien in fee, or in fee tail, or for term of life, or should grant in any other manner a greater estate than they had, then the donor and his heirs might re-enter; and that such a person, issue in tail, being seised by force of the entail, discontinued the

that such a restraint could be annexed to an estate in fee simple. Lord *Coke* also cites 21 *H.* 7, 11 (*a*), and 21 *H.* 6(*b*), *Shepp. Touchst.* 129, 131.

manor to a stranger in tail, remainder to the ancestor of the demandant in fee, and because this discontinuance was against the condition, he, as heir, entered. In supporting a demurrer to this plea, *Rede* says,—"The condition is contrary to the estate, because the donee is tenant not only of the estate tail, but also of the fee simple. For where there is a feoffment in fee upon condition that the feoffee shall not alien, the condition is void, because it is merely contrary to the estate; for the condition goes in defeasance of all his estate. Wherefore it should be taken as void in respect of the remainder in fee, but being void in part it is void in all; and suppose that I make a lease for a term of life, upon condition that if I grant the reversion, the tenant shall have fee, I say that this condition is void, because by the grant of the reversion, a third person has a rightful interest before the condition can take effect. So here, by the grant of the remainder of the fee simple to the donee himself, by reason of the interest which he had in the fee simple, the condition annexed to the estate tail cannot take effect, because it goes in destruction of both. And it is clear that this fee simple can lawfully be aliened, notwithstanding such condition, because it is contrary to the estate of fee simple. And, therefore, because the condition is in part contrarious, and in part against law, it seems to be void altogether. Wherefore, &c." *Keble, contrà.* "It seems to me that one may make a condition with a feoffee in fee simple that he shall not alien." Here *Brian* J. interrupted him, saying—That they would not hear him argue to this purpose (*a cest conceit*), "because it is merely contrary to our common erudition, and is now become in a manner a principle; for by this means we should disturb (*transposer*) all our ancient precedents. Wherefore say no more of this point."

(*a*) H. 21 H. 7, fo. 11, pl. 12. That was a case in the Common Pleas to this effect. A man seised in fee made a gift in tail, upon condition that if the donee died without issue, or if he or his issue aliened in fee, then his estate should cease, and the land should remain to a stranger. The donee aliened in fee, had issue, and died. And the question was, whether he in the remainder might enter or not. *Kingsmil*—In the first place, when a man has land whereof he wishes to create a particular estate, he may make it conditional. As if I give land in tail,—upon condition that neither the donee nor his heirs shall alien in fee,—the condition is good; for, if he aliens in fee, he does wrong to me who am in the reversion: so that this condition is good, to restrain him from doing an act contrary to law. And if I make a lease for term of life, upon condition that he shall not alien over his

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estate, the condition is good—for I may make such condition as I like, with every one who will take such an estate from me. And therefore it seems to me, that if I infeoff one, upon condition that he shall not alien to any one, the condition is good. And if I make lease for term of life, upon condition that if he die the land shall remain to *J. S.*, this remainder does not take effect by the condition but by the livery. And the law is the same of a gift in tail, upon condition that if the donee die without issue the land shall remain over. But the case at the bar is, that if the donee alien in fee, then his estate shall cease, and the land shall remain to a stranger; so that here the remainder can only take effect upon the condition. Then it is to be seen whether this condition be good, and it seems to me that it is not, for the condition is in itself repugnant; for when the donee has made feoffment in fee, then the feoffee has a fee in him, and the land cannot remain over when another has a fee therein in possession. And therefore the condition is in itself impertinent and repugnant. As in this case: I make a lease for term of life, remainder over, and there was a condition that if the first lessee pays to me a certain sum, &c., *J. S.* shall have the land in fee immediately after the death of the first lessee; I say that this is void and repugnant in itself, for there is a mesne estate which cannot be defeated by the condition which comes afterwards; for it cannot be that he shall have the remainder for the term of his life, and that the other shall have the land immediately after the death of the first tenant. So here, by the feoffment, the feoffee has fee simple, during which the remainder cannot so take effect, for another has a mesne interest; and a stranger cannot enter in this manner. And the common case proves this; if I make a lease for term of life, reserving a rent to a stranger, the reservation is void, because he was a stranger to the lease. The law is the same, if I say that for non-payment a stranger shall enter; the entry is void. So here, notwithstanding that such entry might be reserved to the donor, still to a stranger it cannot be reserved; and if the donor enter, he cannot give the land to a stranger by this entry. And thus it seems to me, that in no way can this remainder take effect; for there is a case in our books which proves this case. In *quid juris clamat* against a tenant for term of years, he said that the lessor leased to him upon condition that if he granted over his remainder, the tenant should have for the term of his life—and thus he claims for term of his life; and it was adjudged, that because this condition was repugnant in itself, he should only have for term of years, for when the reversion of the freehold was granted, then the lessee could not by the condition have freehold, for this was in the grantee of the reversion by the fine. So here. *Frowicke*—It seems to me, that he shall not have this remainder in this form, and still the condition is good, for the condition is, that if he die without issue or alien in fee, the

estate shall cease; so this remainder is dependent upon both the one condition and the other, and therefore if any words in the deed can make the condition and the remainder dependent thereon to be good, still that condition is good, and the condition is in the disjunctive; and for one part it is good, that is to say, if he die without issue, and although it be void for the other, yet the condition is good. But I think that no one by such a condition can grant any action or entry to a stranger, but only a chose in possession. As of a lease for term of life, remainder after the death of the tenant for term of life to another in fee, there he has the remainder in possession; but if I make a lease, rendering a certain rent to a stranger, the reservation of rent is void, because he cannot have the rent unless he enter and distrains for it, and I cannot give distress to one who is a stranger to the lease. The case here is, the gift was in tail upon condition that if he discontinued in fee, his estate should cease; and I have taken it, that an estate of inheritance cannot cease by force of the condition broken only, but there must be an entry together with this. But of a particular estate, as for term of life, the law is otherwise. And the reason is, that such estate may cease and be determined by parol as well as by surrender, and therefore it may be determined by the words of the condition in the same manner, for he took this at first with the condition, which is understood to be an agreement that he shall surrender his estate if the condition be not performed. So that such a condition for the taking of the estate countervails a surrender for the non-performance of the condition. As if I make lease for term of life, or of years, upon condition that if I pay him 20*l.* on such a day, his estate shall cease. Now, by the performance of the condition, the estate determines without any other entry; but of an estate of inheritance, the law is otherwise, for this cannot be determined by naked words; nor can it pass by such means, but by livery. And therefore if I make feoffment upon condition that if I pay certain money upon a certain day the estate shall cease, and I pay the money, still the estate is not determined until I have entered. The difference is apparent. But if I make lease for term of years, upon condition that if I alien the reversion in fee, he shall have for term of life, the condition is good. And the cause is, that the fee remains in me who made the condition; and when the fee remains in me I may condition it in such manner as I like. And I will not agree with the case which *Kingsmil* has put,—of *quid juris clamat*,—for when the fee remains in the lessor, he may bind this with condition in whatever manner he wills. And if I make lease for term of years, upon condition that if I enter upon him he shall have for term of life, the condition is good; for thereby I have restrained myself from committing a tort; for if I do so, I have bound my land with the condition, which is good; but, on the other hand, I cannot diminish the interest of a stranger by my con-

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dition, where nothing remained in me, but all in the stranger. And now in this case, here the condition is, that if he aliened in fee, it should remain, &c. But if he does alien, the alienee will have the fee. Then when the alienee has the fee, this land cannot remain by the condition, for it is repugnant that the alienation should be made, and that yet the remainder should take effect, and that for the cause aforesaid. And for other cause it seems void, for the case is, that his estate shall cease and the land remain, and a remainder cannot be without a precedent estate. Then when the estate upon which the remainder should cease is determined, the remainder cannot take effect, for it must be taken upon some estate. And for this cause, it seems, that the condition is as to this point void." The reporter adds, "Note and qu.—for *Vavisor* was of the same opinion."

(b) H. 21 H. 6, fo. 33, pl. 21. "Note, that this question was moved among the justices—*Newton* being absent. A lease is made for a term of years, upon condition that the lessee shall not grant over his estate. And whether that condition be void or not was the question. *Paston.*—The condition seems clearly void, for in making the lease is included that the lessee may grant over his estate; for suppose that a feoffment be made in fee simple, upon condition that the feoffee shall not do waste, the condition is void, because it is included in the feoffment that he may do waste; so that it is but *oppositum in objecto*. *Yelverton.*—In your case, when a feoffment is made in fee, upon condition that he shall not do waste, or that he shall not alien, I admit that the condition is void, because, at the time of the feoffment the fee and the right pass out of the person of the feoffor, so that he has no right reserved in him, and thus the condition by him reserved is void; but, in the case now moved, the freehold and the fee do not pass out of the person of the lessor, so that he may well reserve this condition, &c. *Paston.*—Suppose a lease be made for term of life, upon such condition that he shall not commit waste, I say that this condition is void, and yet a reversion in fee simple still remains in the lessor; and I say that in such a case the condition is void, but this is not on account of the damage which may arise, but for the inconvenience (inconsistency). *Fulth.*—Suppose that one gives land in tail, upon condition that the donee shall not discontinue the entail. Is this condition void? I think not—for *Thirning*, who was chief justice, here gave his land to his eldest son, upon such condition that if he aliened, &c. it should remain to his younger son, and thus he made the remainder to two or three over. *Ascue.*—I think that such a gift in tail, with the condition, is good and effectual; for *Thirning* made such a devise by the advice of the justices of his time, &c. *Paston.*—No, truly—and this I know, that it was done by the assent of such justices, but he said, that he would have the gift openly notified in the Common Pleas; and *Hank.* said that he might well do it, and laughed, and said that the whole

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The next point is, that the *offer* is not issuable. In *Pierce* v. *Win*, after an elaborate argument, it was decided that such a condition was void, both for uncertainty and because it was not issuable. It was urged by *Pollexfen*, who has reported his own argument at great length, that the condition not to attempt or offer to alien, operated as a restriction upon the act of alienation itself; but the Court thought that they must look at the express words of the will, and that they had no power to frame a different condition. In *Beechcroft* v. *Broome* the facts of the case did not call for any decision upon the point now before the Court. That case was not put upon the point, that an alienation by a lawful act would necessarily pass the estate to the purchaser. The true distinction is, that a condition to restrain legal acts is void—illegal, good. No restriction can be imposed upon any particular mode of alienation, unless that mode be illegal. Then, as here the first devise passes an estate in fee, the condition is void. [*Bayley*, J. Suppose an estate tail granted to *A.*, with a proviso that if *A.* should attempt to alien, the land should go over.] Upon the authority of *Mildmay*'s case, this condition would be void.

Cur. adv. vult.

The following certificate was sent to the Vice-Chancellor.

This case has been argued before us by counsel. We are of opinion—First: That *Ware* took an estate in fee

condition was void, and so it seems to me. And note, that in Assize 24, pl. 8, there was found such a gift in tail, upon such condition as is mentioned by *Fulth.* and *Ascue*; and there the condition was held good by all the Court; but it was said, that with respect to *fee simple*, the contrary is law. And note, that this was after averment; and also note, that such gift in tail was made with great deliberation upon the conclusion of an accord between Lord *Fitz-Hugh* and the Lord *Lescrope*."

The reporter adds, "*Vide* 13 H. 4, which accords with what *Paston* has said, in a writ *de ejectione firmæ*, &c."

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in the devised lands, under the will, with an executory devise over, to take effect upon conditions which are void in law. Secondly: That if *Ware* conveyed a part of the devised lands to a purchaser in fee, the title of the purchaser would not be affected by *Ware*'s afterwards mortgaging or levying a fine, or suffering a recovery of, the residue. Thirdly: That if *Ware* conveyed the whole estate to a purchaser in fee, such purchaser would have a good title to the fee against all persons claiming under the will.

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J. PARKE.

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Where a trader, after having obtained his certificate under three commissions of bankrupt, under none of which any dividend had been paid, was arrested for a debt contracted between the second certificate and the third bankruptcy, the Court refused to discharge him out of custody on filing common bail.

And such third commission was said to be a nullity (*c*).

A Commission of bankrupt issued against the defendant in 1814, under which he obtained his certificate; a second commission issued in 1826, under which he also obtained his certificate; and in 1829 a third commission (*a*) issued, under which he also obtained his certificate. The defendant being arrested upon mesne process for a debt which had accrued in 1828, *Platt* in last Michaelmas term obtained a rule under 6 *Geo.* 4, c. 16, s. 126 (*b*), calling upon the plaintiff to shew cause why the defendant should not be discharged out of custody on filing common bail. By the plaintiff's affidavits in answer, it appeared that no dividend had been paid under any of these commissions.

Comyn shewed cause in the same term. The plaintiff is

(*a*) Since superseded, *Ex parte Lane, in re Fowler*, Mont. 12.

(*b*) Which enacts, "That any bankrupt who shall, after his certificate shall have been allowed, be arrested, (or have any action brought against him,) for any debt, claim, or demand hereby made provable under the commission against such bankrupt, shall be discharged upon filing common bail."

(*c*) *Vide tamen Ex parte Welsh, in re Merryweather*, Mont. 276, *contrà*.

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not barred of his common law remedy by action. Both the last commissions issued since the present bankrupt act came into operation. The debt is not provable under the second bankruptcy, inasmuch as it had not accrued at the time when the second commission issued. The plaintiff could not prove under the third bankruptcy, because the third commission was a nullity, on the ground that as 15*s.* in the pound had not been paid under the second, the after-acquired property (*a*) of the bankrupt vested in the assignees under that commission by 6 *Geo.* 4, c. 16, s. 127 (*b*), and

(*a*) A right of action accruing to the bankrupt against his assignees, by virtue of an express contract with them, (*Coles* v. *Barrow*, 4 Taunt. 754; *Chippendale* v. *Tomlinson*, Cooke's B. L. 6th ed. 446; *Silk* v. *Osborn*, 1 Esp. N. P. C. 140;) would not, however, vest in those assignees.

So, if the bankrupt, with the consent of his assignees and creditors, trade for his own benefit, it would be a fraud upon subsequent creditors to seize the property with which they had entrusted him, upon the faith of such assent, and distribute it amongst the old creditors.

Another species of property which could not vest in the assignees under a precedent commission, but which might be rendered available to creditors under a new commission, would be goods which, subsequently to the awarding of such precedent commission, are in the possession of the trader, by consent of the true owner (such owners not being the former assignees, *Nelson* v. *Cherrell*, 7 Bingh. 663, and 5 Moore & Payne, 680.) Such goods could not vest in the existing assignees under 6 *Geo.* 4, c. 16, s. 127, as part of the future estate *of the bankrupt*—since the bankrupt himself would have no estate or interest therein—and yet the possession of these goods may have been the sole cause of the credit given.

So, if the bankrupt, having paid 10*s.* in the pound, received 500*l.* from the estate as his *allowance* under 6 *Geo.* 4, c. 16, s. 128, such allowance could not be seized for the benefit of the former creditors; but there seems to be no reason why this money should not be made available towards satisfying debts contracted in the course of a *subsequent* trading.

(*b*) By which it is enacted, "That if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain, such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect

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consequently the bankrupt could have acquired no property upon which a third commission could operate. *Till* v. *Wilson* (*a*) and cases there cited (*b*), *Robinson, Ex parte, in the matter of Freer* (*c*). [*Littledale*, J. A commission may be taken out against an insolvent debtor whose effects are vested in the assignee (*d*).]

Gurney, contrà. The third commission may have been supersedable, but it was not absolutely void. In *Robinson, Ex parte*, the Court was merely unwilling to expose the parties to the risk of being turned round for want of a sufficient petitioning creditor's debt, where the doubt might be removed by substituting the name of the petitioner *Robinson*. To hold that the third commission was an absolute nullity, would render all acts of the commissioners and assignees void. [*Parke*, J. Under the old acts, after-acquired property is not vested in the assignees, but is made liable to judgments. *Bayley*, J. The defendant has obtained his certificate, but it is obtained under a commission under which the plaintiff could not have proved.]

Platt on the same side. *Till* v. *Wilson* is the case that

his *person* from arrest and imprisonment, but his future *estate and effects*, (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife and children), shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such a bankrupt was possessed at the issuing the commission."

(*a*) *Ante*, i. 580; 7 B. & C. 684.

(*b*) These cases are all noticed in the judgment, *post*, 356.

(*c*) Montague & M'Arthur, 44, where it was held, that a bankrupt who, under a second commission, has not paid 15*s.* in the pound, cannot be a petitioning creditor, his property being vested in the assignee under the second commission. This would not, however, prevent such bankrupt from suing out a commission of bankrupt against an assignee under the second commission, who had since become indebted to the bankrupt by express contract. *Vide supra*, 353 n.

(*d*) As to which, see *Jellis* v. *Mountford*, 4 B. & A. 256; *Shuttleworth, Ex parte*, 2 Glyn & Jameson, 68.

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presses most strongly against the defendant. In that case, however, no certificate had been obtained under the first commission before the second commission issued. A writ of extent (*a*) may issue against the lands, goods, and person, although the extendee has neither lands nor goods. If the bankrupt had secreted goods under the third commission he would have been guilty of felony, and would have been estopped from saying that the third commission was void, and not merely voidable, if such commission had not been in fact abandoned. [*Bayley*, J. The submitting to the second commission raises a presumption. *Parke*, J. It is a strong argument for the defendant that the certificate is made conclusive evidence of the trading, &c. If the certificate cannot be avoided by shewing that there was no trading, &c. why should it be avoided by shewing a prior commission ?]

Cur. adv. vult.

In this term, Lord *Tenterden*, C. J. after stating the facts and the arguments, delivered the judgment of the Court. We are of opinion that the 126th section of 6 *Geo.* 4, c. 16, makes the certificate conclusive evidence only of the *fact* of the trading, act of bankruptcy, commission, and other proceedings, leaving untouched the *validity* and *effect* of those proceedings, and the manner in which they may be questioned. In *Martin* v. *O'Hara* (*b*) it was held by Lord *Mansfield*, that an uncertificated bankrupt is incapable of trading or contracting for his own benefit: that all the property which he acquires belongs to his creditors,

(*a*) The Court of Exchequer, in awarding the writ of *capias extendi facias*, has no judicial knowledge that the extendee has no goods or lands, still less that he will have none before the return of the writ. The decision in *Till* v. *Wilson*, (*ante*, vol. i. 580, and 7 Barn. & Cresw. 684,) proceeds upon the legal *impossibility* of the trader's having any property upon which the commission could operate. To make the analogy from the writ of extent applicable to this view of the case, that writ should be supposed to issue against a party under a *legal impossibility* of possessing property.

(*b*) Cowper, 823.

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and that as he cannot trade for himself he cannot be the object of a second commission; and it was said by *Buller*, J. to be perfectly clear, that a second commission cannot be taken out against an uncertificated bankrupt. Lord *Hardwicke*, in *Proudfoot, Ex parte* (*a*), and Lord *Loughborough*, in *Nunn, Ex parte* (*b*), have stated that a second commission before the trader has obtained a certificate under the first, is void at law. The same opinion has been expressed by Lord *Eldon* on several occasions (*c*). In *Hollingsworth, Ex parte* (*d*), Lord *Thurlow* appears to have entertained a different opinion; and in *Butts* v. *Bilke* (*e*), *Thomson*, C. B. doubted, and the Court of Exchequer desired that the question might be stated in a special verdict. In the very recent case of *Till* v. *Wilson* (*f*), this Court, however, decided that a second commission issued before a certificate had been obtained under the first, was absolutely void at law; and from that decision we see no reason to depart. We consider that it is fully settled by the above authorities that the great seal has no power to award a commission for the purpose of distributing effects already vested in assignees under a prior commission, and that a commission so awarded is void. A third commission, where 15*s.* in the pound has not been paid, appears to us to be equally void. The 6 *Geo.* 4, c. 16, s. 127, differs from 5 *Geo.* 2, c. 30, s. 5, which directs that the future effects of the bankrupt shall remain liable to creditors, that is, to *individual* creditors. This, according to *Hovill* v. *Browning* (*g*) and *Todd* v. *Maxfield* (*h*) did not prevent such future effects from vesting in the assignees under a subsequent commission. But by the present act, the property is expressly vested in the assignees under the former commission, who are therefore entitled to *all* the effects of the bankrupt; so that there is nothing upon

(*a*) 1 Atk. 251.
(*b*) 1 Rose, 322.
(*c*) 15 Ves. 114, 543; 16 Ves. 236, 473; 1 Rose, 136, 285; 2 Rose, 189, 172.
(*d*) Cooke B. L. 10.
(*e*) 4 Price, 240.
(*f*) *Ante*, 285 (*b*).
(*g*) 7 East, 154.
(*h*) 5 Dowl. & Ryl. 258; 3 Barn. & Cressw. 232.

which a subsequent commission can operate(a). In this respect the present case is brought precisely within the proper ground of the decision in *Martin* v. *O'Hara*. We cannot think that, for the purpose of enabling a party to obtain his discharge, we are bound to give effect in a Court of Law to a commission which for any other purpose is wholly ineffectual. Frequent discharges under the bankrupt laws are injurious to the honest tradesman. Under a second commission, therefore, 15*s.* in the pound is required to be paid before the bankrupt is enabled to trade again. We must follow the spirit of that enactment, by deciding against the validity of a third commission where no such payment has been made. The consideration of the bankrupt's discharge is the giving his property up to his creditors. Here, the defendant had nothing to give up—and having nothing, he, in some sort, committed a fraud upon every person from whom he obtained credit.

Rule discharged (b).

(a) *Sed vide ante*, 353 (a).
(b) And see *Phillips* v. *Hopwood*, *ante*, 15; 1 Barn. & Adol. 619.

DOE d. MANN *v.* WALTERS.

An agent to receive rents has no implied authority to give notice to quit.

Where notice to quit is given by an agent, the authority of such agent must be complete a half year before the expiration of the notice, or at least before the day of the demise laid in a declaration in ejectment, brought in respect of such notice.

EJECTMENT for lands in the parish of Mawgan in Meneage, in the county of Cornwall. At the trial before *Burrough*, J. at the Bodmin Assizes (c), 1829, the following facts appeared:—

The lands in question were part of the glebe of the parish of Mawgan in Meneage, and had been demised by the lessor of the plaintiff, who was the rector of the parish, to the defendant from year to year. The lessor of the

(c) Counsel for the plaintiff, *Wilde*, Serjt. and *Coleridge*; for the defendant, *Follett*.

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plaintiff being non-resident, the defendant's rent was paid from time to time into a banking-house in the neighbouring town of Helston, upon the following receipts :—

"Union Bank, Helston, 25th January, 1823.

"Received of Mr. *Joseph Walters*, twenty-five pounds to account of Rev. *Horace Mann*.

"For *Grylls & Trevenem*,
£25. "*John Kendall*, junior."

"Union Bank, Helston, 10th January, 1824.

"Received of Rev. *Horace Mann*, seventy-five pounds to account.

25 rent. "For *Grylls & Trevenem*,
50 cattle, corn, &c. "*R. Edmonds*, junior."

£75.

The receipts for the two following years were in the same form as that of 25th January, 1823. On the 22d June, 1827, the following notice was served on the defendant's wife at his dwelling-house :—

"Mr. *Joseph Walters*,

"I do hereby, as the agent for and on the behalf of the Rev. *Horace Mann*, your landlord, give you notice to quit and deliver up, on the twenty-fifth day of December next, the possession of the dwelling-house, farm lands, and premises, with the appurtenances, which you now hold of the said *Horace Mann*, situate in the parish of Mawgan in Meneage, in the county of Cornwall, or at the end of the current year of your tenancy, which shall expire next after the end of one half-year from the time of your being served with this notice. Dated the 22d day of June, 1827.

"Yours, &c. *H. M. Grylls*,
"Agent for the said *Horace Mann*."

H. M. Grylls was an attorney residing at Helston, and was also a partner in the Helston bank. It was contended for the defendant, that the notice was void for want of authority. The learned judge was however of opinion that *H. M. Grylls*, as a *receiver*, had authority to determine the tenancy, inasmuch as it had been repeatedly held that a *receiver* has such an authority (*a*); and the jury, under his lordship's direction, returned a verdict for the plaintiff.

In Michaelmas term, 1829, *Follett* obtained a rule nisi for a new trial; against which,

Coleridge now shewed cause. It will not be necessary to rely upon the cases in which a receiver appointed by the Court of Chancery, has been held to be an agent sufficiently authorized to give a notice to quit. In *Goodtitle* d. *King* v. *Woodward* (*b*), where the notice was signed by an agent, and purported to be given by him as agent for all the lessors of the plaintiff, (who were trustees for the repair of a highway,) it appeared that at the time that the notice was served, the authority to the agent had been signed by *part* only of the trustees, and that the rest had signed it subsequently; and it was held that the subsequent *recognition* gave effect to the authority. So here, the bringing of this action is a sufficient recognition of the authority of the agent. The distinction is between a recognition of the *notice*, which would not be sufficient, inasmuch as the lessee must receive such a notice as he can act upon at the time, and a recognition of the *agency*, which is sufficient upon the principle adopted in *Goodtitle* v. *Woodward*—*omnis ratihabitio retrotrahitur et mandato æquiparatur*. In *Right* v. *Cuthell* (*c*) the notice was insufficient, because by the terms of the lease it was required to be given in a particular form.

(*a*) *Vide Wilkinson* v. *Colley*, 5 Burr. 2694; *Doe* d. *Marsack* v. *Read*, 12 East, 57; *Wynne* v. *Lord Newborough*, 1 Ves. jun. 165.

(*b*) 3 Barn. & Alders. 689.

(*c*) 5 East, 491; *S. C.* differently reported as to the proviso in the lease, 2 Smith, 83, 84 *n.*; *S. C.* 5 Esp. N. P. C. 149.

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Here, the notice upon the face of it, appears to be good, and the only question is as to the agency, which is sufficiently ratified here by the adoption of the act in bringing the ejectment. *Rowe* d. *Dean and Chapter of Rochester* v. *Pierce* (*a*).

Follett contrà. In *Goodtitle* v. *Woodward*, the notice was read to the tenant and not objected to by him. Here, the service was on the wife. The defendant could not have safely acted upon this notice. Nor was there, indeed, any evidence that the lessor of the plaintiff had authorized the bringing of the present action.

Bayley, J.—There must be a new trial. The authority to give the notice to quit is a question for the jury. I at present give no opinion whether *Goodtitle* v. *Woodward* was rightly decided or not; but supposing that case to have been rightly decided, it does not make out the plaintiff's proposition, as no recognition of the agency before the day of the demise laid in the declaration is shewn, which at all events is essential.

Littledale, J.—There must be a new trial. Upon this evidence, if I had been on the jury I should have found for the defendant. There was no proof of authority. The supposed recognition is clearly insufficient here. But my present impression is, that the notice to quit would be invalid unless it were ratified full *six months* before the day on which the notice would expire.

Parke, J.—I am not prepared to say that if the notice had been delivered personally to the defendant, and he had *assented* to the statement of *Grylls*'s being agent, the notice would not have been sufficient; but it appears to me that there is no proof that the lessor of the plaintiff delegated any general authority to *Grylls*.

(*a*) 2 Campb. 96.

A person entrusted by the landlord to receive rents has no power to give notice to quit.

Rule absolute (*a*).

(*a*) See the cases collected and examined in *Doe* d. *Elliott* v. *Hulme*, *ante*, ii. 434, n.

HAMMOND *v.* BLAKE.

The master of a vessel does not incur the penalties imposed by 6 *Geo.* 4, c. 125, s. 58, for refusing to take a pilot on board, unless it distinctly appear that the pilot at the time of offering his services produced his licence.

DEBT upon 6 *Geo.* 4, c. 125 (*b*), for a penalty incurred by the defendant for acting, himself, as pilot of a vessel of which he was master, and of which a duly licensed pilot had offered to take charge. Plea: nil debet.

At the trial before Lord *Tenterden*, C. J. at the sittings at Guildhall after last Michaelmas term, a witness proved that he offered his services to the defendant, who knew that he was a pilot, and refused to employ him, and continued to pilot the vessel himself, though navigating within the limits where he was bound to take a pilot, if one duly qualified should tender himself. It was not proved that the witness *produced* his licence, and no question was asked about it.

(*b*) By which it is enacted (section 58) "that every master of any ship or vessel, who shall *act himself as a pilot*, or who shall employ, or continue employed, as a pilot, any unlicensed person or any licensed person acting out of the limits for which he is qualified, or beyond the extent of his qualification—after any pilot licensed and qualified to act as such, within the limits in which such ship or vessel shall then actually be, shall have offered to take charge of such ship or vessel, or have made a signal for that purpose, shall forfeit for every such offence double the amount of the sum which would have been legally demandable for the pilotage of such ship or vessel; and shall likewise forfeit for every such offence an additional penalty of £5 for every fifty tons burthen of such ship or vessel, if the corporation of Trinity House, of Deptford-Strond, as to cases in which pilots licensed by or under the said corporation shall be concerned, or the said lord warden for the time being, or his lieutenant for the time being, as to cases in which the cinque port pilots shall be concerned, shall think it proper that the person prosecuting should be at liberty to proceed for the recovery of such additional penalty, and certify the same in writing."

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For the defendant it was contended, that it was necessary to prove that the licence had been produced by the pilot, on the ground that a penalty is imposed by 6 *Geo.* 4, c. 125, s. 66 (*a*), on pilots acting in that capacity without producing their licence. Lord *Tenterden*, C. J. adopted this construction of the statute and directed a nonsuit, which

Scarlett, A. G. now moved to set aside, and contended that the production of the licence was unnecessary. The defendant thought fit to pilot the vessel after he had received an offer of the witness's assistance. It was proved that the defendant knew that the witness was a pilot. The provisions of the sections 58 and 66 are separate and distinct. If the defendant had demanded to see the licence under a doubt of the witness being a pilot, it might have been an excuse. But if he does not chuse to ask for it, the case must be decided according to the real fact. Where a provision is accompanied with a qualification *in the same clause*, the plaintiff is bound to negative the qualification. But if the clauses be distinct, the qualification is matter of defence to be proved on the part of the defendant. This may be illustrated by a reference to the game laws. In a declaration you must negative the exception, because it is

(*a*) Which enacts, "that no person shall take charge of any ship or vessel, or in any manner act as a pilot, or receive any compensation for acting as a pilot, until his licence shall have been registered by the principal officers of the custom-house of the place at or nearest to which such pilot shall reside, (which officers are hereby required to register the same without fee or reward), nor without having his licence at the time of his so acting in his personal custody, and producing the same to the master of any ship or vessel, or other person who shall be desirous of employing him as a pilot, or to whom he shall offer his services, on pain of forfeiting a sum not exceeding 30*l.* nor less than 10*l.* for the first offence; and for the second or any subsequent offence, a sum not exceeding 50*l.* nor less than 30*l.*, and upon further pain as to any person licensed as aforesaid, of forfeiting his licence or being suspended from acting as a pilot by and at the discretion of the corporation or other authority from which such pilot's licence was derived, either for the first, second, or any subsequent offence."

contained in the same clause (*a*). If it had been meant that the master should not be liable unless the pilot produced his licence, it would have been easy to have said so.

Lord TENTERDEN, C. J.—We cannot say that a master is liable to a penalty for refusing to allow the pilot to do an act which would have rendered the latter liable to a penalty.

BAYLEY, J.—Though the 58th section contains no provision for the production of the licence, the 70th section provides that no person shall take charge of a ship *without producing his licence.*

LITTLEDALE, J.—The subsequent section contains a prohibition restraining all persons from acting as pilots without *producing* their licence.

PARKE, J.—Upon the evidence it must be taken that the licence was not produced. This is required by the act to be done before the pilot can take charge of the vessel. It is of great consequence that the master should have the means of knowing whether the person to whose care the ship is to be trusted is duly qualified.

The 66th section containing no provision requiring a demand of the production of the licence; the pilot must produce it, whether demanded or not.

Rule refused.

(*a*) But in a declaration for penalties for offences against the game laws a general averment of want of qualification is sufficient, without specially negativing the particular qualifications mentioned in 22 & 23 *Car.* 2, c. 25, *Bluet* v. *Needs*, 2 Comyns, Rep. 524.

Nor is it incumbent on the plaintiff to negative the qualifications in evidence. *Jelfs* v. *Ballard*, 1 Bos. & Pul. 468, 469.

As to the course pursued with respect to negativing qualification in cases of summary conviction before justices, see *Rex* v. *Stone*, 1 East, 639, 649; *Rex* v. *Turner*, 5 Maule & Selw. 206; *Rex* v. *Marsh*, 4 Dowl. & Ryl. 260, and 2 Barn. & Cressw. 717.

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BERNASCONI and others *v.* FAREBROTHER, WINCHESTER, and WILTON.

A trader does not commit an act of bankruptcy within 6 *Geo.* 4, c. 16, sect. 3, by absenting himself, unless he absent himself from some place at which he would, in the ordinary course of his life and business, be expected to be found, or at which he has appointed to meet particular creditors.

A commission of bankrupt, describing the parties as "bankers, being traders according to the provision of the statute 6 *Geo.* 4, intituled, &c." is good, though they had ceased to be bankers before that statute passed, for the word "bankers" is descriptive of their persons only, and the word "traders" is a sufficient allegation that they were, as such, liable to the bankrupt laws.

Such a commission may be supported by evidence of any species of trading carried on by the bankrupts after the passing of the statute.

THIS was an action of trespass, for breaking and entering the house and lands of the plaintiffs, and seizing and carrying away their goods and chattels.

Plea by *Farebrother* and *Winchester*, first, not guilty, secondly, a justification as sheriff of Middlesex, under a fieri facias against *A. H. Chambers* the elder, at the suit of the defendant *Wilton*, under which they entered the dwelling-house in which &c., the door being open, in order to seize the goods of *A. H. Chambers* the elder then being therein, and did seize and carry them away. Replication: de injuriâ suâ propriâ, absque tali causâ.

The defendant *Wilton* pleaded, first, not guilty; and secondly, that in Easter term, 8 *Geo.* 4., he obtained judgment against *A. H. Chambers* the elder, for 1828*l.* debt, and 7*l.* costs, whereupon he issued a fieri facias directed to the sheriff of Middlesex, which writ was delivered to the defendants *Farebrother* and *Winchester*, then being such sheriff, to be executed; and that he, the defendant *Wilton*, as the servant of the defendants *Farebrother* and *Winchester*, and by their command, entered the said dwelling-house in which, &c., the door being open, and seized and carried away certain goods of *A. H. Chambers* the elder, then being therein. Replication, de injuriâ suâ, &c.

At the trial before Lord *Tenterden*, C. J., at the adjourned Middlesex sittings after Hilary term 1829, the case was this:—

The goods in respect of which the action was brought had been the property of *A. H. Chambers* the elder, who had carried on business as a banker in partnership with his son, *A. H. Chambers* the younger, until the year 1824, when they stopped payment. In November 1825 a com-

mission of bankrupt issued against them, under which the present plaintiffs were chosen assignees, and in February 1826 an assignment was executed to them: but they did not declare in the present action as assignees of the bankrupts (*a*). Subsequently to this assignment, the defendant *Wilton* had brought an action against *A. H. Chambers* the elder, for an alleged debt of 1828*l.*, in which action judgment was suffered to go by default, and a writ of fieri facias afterwards issued, under which the defendants *Farebrother* and *Winchester*, then being Sheriff of Middlesex, seized the goods now in dispute. The commission, which was produced on the part of the plaintiffs, described the bankrupts as "*bankers*, being traders, according to the provisions of the act, 6 *Geo.* 4, intituled," &c., upon which it was objected on the part of the defendants, that the Bankrupt Act not having passed till 1825, and the bankrupts having ceased to trade as *bankers* in 1824, they had never traded as such since the act came into operation; that it was necessary to shew a trading, such as that described in the commission, carried on since the passing of the act;

(*a*) See the case, entitled *Bernasconi and others* v. *Farebrother* and *Winchester*, Sheriff of Middlesex, and *Henry Wilton*, 7 Barn. & Cress. 379, where a motion to stay the proceedings in *this* action until the sheriff was indemnified, was refused, on that very ground. Lord *Tenterden*, C. J., there said, "If we were to stay this action of trespass, we should take from the plaintiffs that ordinary protection to which they are by law entitled. In the first place, the plaintiffs do not bring this action in the character of assignees, but upon their own possession. If they had sued as assignees affirming the commission, it would have opened another consideration. They claim the property legally as their own, though they act as trustees for the general creditors. *Chambers* became a bankrupt in 1825, and the plaintiffs were chosen assignees immediately afterwards. They have been in possession of the farm and stock ever since; they have renewed part of the stock, and have brought in fresh stock of their own. After such a possession, the sheriff is to be deemed primâ facie a trespasser if he levies upon it. He may, perhaps, be able to defend himself in the present action, by shewing that the commission against *Chambers* is invalid, but even such a case would only protect him as to the seizure of stock which had previously belonged to *Chambers*."

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and that for want of such evidence the present commission could not be supported. It was answered, that it was unnecessary for the commission to describe the trading at all; that the general term "traders" used in this commission was sufficient, and that the word "bankers" might be taken as a description, not of the *trade*, but of the *persons* of the bankrupts; and that evidence of a subsequent and different trading, which it was proposed to give, would support the commission. Lord *Tenterden*, C. J. was of that opinion, and received the additional evidence, from which it appeared that the bankrupts, since the passing of the act, had carried on business, in conjunction with one *White*, as pozzolana manufacturers. An act of bankruptcy by *Chambers* the elder was clearly proved, and not, indeed, disputed. To prove an act of bankruptcy by *Chambers* the younger, which was alleged to be by *absenting* himself from his usual place of abode, with intent to delay his creditors, the following facts were given in evidence. After Messrs. *Chambers* had stopped payment as bankers, a committee of their creditors was appointed to wind up the affairs of the concern, which committee hired a house for that purpose in South-Molton Street, where they met and carried on the investigation of the accounts. A letter of licence was granted to Messrs. *Chambers* to protect them from arrest, and they undertook to attend the committee in South-Molton Street, and to assist them in winding up the affairs, whenever they should be required so to do. The committee continued their investigation up to the 9th of November 1825, and up to that time *Chambers* the younger did attend them whenever he was required to do so. Upon that day the committee was dissolved, and the letter of licence revoked, and *Chambers* the younger was never afterwards seen in South-Molton Street. Between that day and the 19th of November, a sheriff's officer, who had a writ against him, frequently searched for him there, but always unsuccessfully; and it was afterwards discovered that, during that interval, he was residing in a house in North Crescent,

Tottenham-Court Road, which he had occupied for two years. It was contended on the part of the defendants, that this was not sufficient evidence of an act of bankruptcy by *Chambers* the younger; but Lord *Tenterden* was of opinion that there was *some* evidence, though *slight*, of an *absenting* himself, and that it ought to be left to the jury. It was further contended, that *Chambers* the elder, having *submitted* to the commission and received the benefit of it, was *estopped* from disputing its validity in a Court of Law (*a*); and that *Wilton* had acted in collusion with him in obtaining his judgment, and was therefore estopped in like manner. Lord *Tenterden* was of opinion, that even if *Wilton* had acted collusively, (which was a question for the jury), and was thereby estopped, the other defendants clearly were not; and left the case accordingly to the jury, who found a verdict for the plaintiffs. In Easter term 1829, *Gurney* obtained a rule nisi for a new trial, on the ground of the invalidity of the commission, and of the insufficiency of the evidence of an act of bankruptcy by *Chambers* the younger. Lord *Tenterden* referred to *Small, Ex parte* (*b*).

Scarlett, A. G., *F. Pollock*, and *Hutchinson* shewed cause. First, the *description* of the bankrupts in the commission was sufficient, and the plaintiffs were properly allowed to give evidence of a trading by them as pozzolana (*c*) manufacturers. The commission described them as "bankers, being traders within the meaning of the statute 6 *Geo.* 4, c. 16." The second section of that statute contains an enumeration of the persons who shall be deemed traders liable to become bankrupt, and it was sufficient to shew that Messrs. *Chambers* came within the description of one or other of those persons. The word "bankers" is descriptive, not of the *trade*, but of the *person*, and may be either treated as mere *addition*, or rejected altogether as

(*a*) See *Watson* v. *Wace*, 7 Dowl. & Ryl. 633; 5 Barn. & Cress. 153,—and the authorities there cited.

(*b*) 2 Wils. Chancery Cases, 85.

(*c*) A sort of cement.

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surplusage; and then the bankrupts will stand described simply as "traders," which is quite sufficient. If they had been described as "traders, being bankers," instead of "bankers, being traders," there might have been some ground for the objection. In *Hale* v *Small* (*a*), a commission of bankrupt was issued against a trader, describing him as "a dealer in cattle, and seeking his trade of living by buying and selling," without the words "dealer and chapman." At the trial of an action of trespass brought by him against his assignees, evidence was received of *a dealing in hops*, and a verdict was found for the defendants. That verdict was afterwards set aside, and a new trial granted, not upon the ground that the evidence was *inadmissible*, but that it might have operated as a *surprise* upon the plaintiff. On the second trial the same evidence was again received, after objection, and was held to have been properly received, as the words "dealer in cattle" were descriptive of the *person* only; and the general statement that the bankrupt got his living by "buying and selling," was sufficient to let in evidence of any trading whatever. Upon the same principle the language of the commission here, "being traders according to the provisions of the statute," forms a sufficiently general statement to render evidence of any species of trading admissible (*b*). In *Ex parte Herbert* (*c*) the bankrupt was described as "a waterman, dealer and chapman," and Lord *Eldon*, C. held, that the general allegation which followed, of "seeking a living by buying and selling," was sufficient to render the commission valid. In *Smith* v. *Sandilands* (*d*), where the bankrupt was described as "money scrivener" *only*, it was held, by *Holroyd*, J., that the plaintiff, in an action to try the validity of the commission, was not precluded by that limited description from proving any species of trading.

(*a*) 4 B. Moore, 415; 2 Brod. & Bingh. 25. Reported also in 8 Taunt. 730; 3 B. Moore, 58.

(*b*) *Vide Bernasconi* v. *Lord Glengall*, *ante*, vol. i. p. 327, n. (*b*).

(*c*) 2 Ves. & B. 399; 2 Rose, 248.

(*d*) Gow's N. P. C. 171. And see *Tanner, ex parte*, 1 Mont. & Bligh, 391.

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In *Bernasconi* v. *Lord Glengall* (*a*), where the commission stated that *A.* and *B.*, bankers, being traders according to the provisions of the 6 *Geo.* 4, c. 16, some time since became bankrupt, within the intent and meaning of that statute, it was held that it was sufficiently alleged that the bankrupts had traded, and had committed an act of bankruptcy, since the passing, and within the operation of that statute. And Lord *Tenterden*, C. J., in the course of his judgment, said, "The use of the word 'bankers' only in this commission, without the words 'dealers and chapmen,' upon which an objection has been founded, presents in reality no difficulty at all; because that word is descriptive, not of the *trade* of the bankrupts, but of their *persons* only. The commission is awarded against them as 'being traders according to the provisions of the statute,' which is a perfectly sufficient allegation of their being traders."(*b*) That seems decisive of the present case upon the first point. [*Parke*, J. Might not a commission of bankrupt issue against *A. B.* without any description?]

Then, secondly, there was evidence to go to the jury of an act of bankruptcy having been committed by *Chambers* the younger, by *absenting himself* from the house in South-Molton Street, and the jury having been satisfied with that evidence, the verdict ought not to be disturbed on that point. It was clear that *Chambers* the younger *did* absent himself from the house in South-Molton Street, and it was for the jury to say with what *intent* he did so.

Gurney, on the following day, in support of the rule. The Court ought not to be called upon to make good the blunders of the parties. In *Smith* v. *Sandilands* (*c*) the parties had omitted to draw the legal result. In *Bernasconi* v. *Lord Glengall* (*d*) this objection was not taken, and the Court was therefore not called upon to decide the point.

(*a*) *Ante*, vol. i. p. 326.
(*b*) *Ibid.* 330.
(*c*) *Suprà*, 368.
(*d*) *Ante*, i. 326.

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In *Hale* v. *Small* (*a*) the party was described as seeking his living by buying and selling. Here, the manufacturing of cement would have been a particular instance of such trading. [*Bayley*, J. You do not notice the Chancellor's order of 1816, which directs that no commission shall be issued in which the bankrupt is described only as "*farmer, grazier, drover*, or *underwriter*" (*b*), and that, where no other description is given in the bond and affidavit, the words "dealer and chapman" should be added in the petition and commission.] That order does not apply since the late act. [*Bayley*, J. The object of that order was to obviate objections on the ground of the non-appearance of the liability of the party to the bankrupt laws, and the consequent jurisdiction of the Chancellor to issue a commission. The only use of referring to it now is to shew that the Chancellor thought a *specific* order necessary.]

Campbell, on the same side. As to the trading as pozzolana manufacturers, the understanding of the profession has been, that in all cases where a different trading from that set out in the commission has been admitted to be set up, the commission has had the words dealer and chapman, or the party has been described as carrying on one of the trades mentioned in the act. This was the case in *Herbert, Ex parte* (*c*), and *Hale* v. *Small*. In each of those cases, the description of "persons using trade of merchandize" occurs. To shew the general understanding of the profession upon this point, Mr. *Eden*'s book (*d*), though not an authority, may be adverted to. In the case referred to by the Lord Chancellor, in *Small Ex parte* (*e*), evidence of a trading of a different description from that mentioned in the commission was admitted under the general words; because it

(*a*) 2 Brod. & Bingh. 25, and 4 B. Moore 415, after a second trial, overruling *S. C.* upon a former trial, 8 Taunt. 730, and 3 B. Moore, 58.

(*b*) Which occupations did not at that time bring the parties who exercised them, within the operation of the bankrupt laws.

(*c*) *Suprà*, 368, *infrà*, 372.

(*d*) Eden, B. L. first ed. 53.

(*e*) *Suprà*, 367.

was necessary for the plaintiff, who, by bringing an action complaining of a commission, admitted that *he* was the person against whom it issued, to shew, not merely that the commission was supersedable, but that it was absolutely void at law. As to the suggestion thrown out yesterday by *Parke*, J. as to whether any trading at all was necessary to be stated, and whether a commission might not issue simply against *A. B.*,—it is to be considered that the power given by the commission is enormous, extending to the body, lands, &c. of the party:—In the exercise of such a power, it is necessary that the jurisdiction should be shewn. This is very analogous to the case of warrants granted by magistrates, in which it is necessary that it should appear upon the face of the instrument that the magistrate is acting within his jurisdiction, and that the party has been charged with an offence within his cognizance. In an award, the authority of the arbitrator need not perhaps be recited (*a*),—not so here. It is submitted that it would not be enough to say "being a trader." The second section enumerates the trades which subject and which do not subject the party to the operation of the bankrupt laws. Both classes may be considered to be traders, but the commission should shew that the party comes within the first division. It should state precise facts, or at least allege that the party was a dealer and chapman. Then the Court cannot strike out the word "bankers". The words "bankers being traders" must mean traders *as* bankers. It would have been different, if, instead of "bankers," the word "esquires" or "gentlemen" had been used. Suppose the commission had stated that the Chancellor had been informed that *Chambers* had committed an act of bankruptcy by publishing a declaration of insolvency in the London Gazette, such a commission could not have been supported by proof of any other act of bankruptcy. [*Parke*, J. The commission does not state the petitioning creditor's debt, nor does it state the nature

(*a*) The parties must take notice of the terms of their own submission.

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of the act of bankruptcy.] It states that the party has become bankrupt; but it is submitted that the commission would be good, if instead of reciting that the party had become bankrupt, it had said "provided he has committed an act of bankruptcy, &c." A decision in favour of the present commission would lead to great looseness of description. Before the Vice-Chancellor the point respecting the manufacture of pozzolana never arose, nor did it arise in *Bernasconi* v. *Lord Glengall*. [*Scarlett*, A. G. The trading as pozzolana-manufacturers was before the Chancellor.] The case went before the Chancellor upon the second point,—whether the act of bankruptcy was sufficient.

No act of young *Chambers* after the alleged act of bankruptcy can be given in evidence to support this commission. It might be said that *Wilton* is affected by the act of the elder *Chambers* in surrendering to the commission. It was necessary to prove an act of bankruptcy between the 1st of September and the 19th of November. The sheriff's officer proved a going to South-Molton Street, and that young *Chambers* was not found there, but there was no occasion for his being there after the committee for winding up the affairs had ceased to act. [*Bayley*, J. There was an accumulation of letters in South-Molton Street.] It must be a place from which he *absents* himself. Where a trader breaks an appointment to meet a party at a particular spot, that is an absenting himself; but the usual case of absenting proved, is an absenting from the dwelling-house. Young *Chambers*'s dwelling-house was in North Crescent, where no one went to inquire after him. There was no reason to suppose that he might not have been found there at any hour. The not going from his dwelling-house to South-Molton Street, where he had no business to transact, was not an absenting himself. *Chambers* had carried on business in Berners Street. In 1824 *Chambers* ceased to carry on the business, and it was conducted under inspectors, who employed other bankers. This is not like the case which has been referred to of a

timber-merchant winding up his business. The office in South-Molton Street was taken *by the trustees.* Young *Chambers* attended from time to time to assist in winding up the concern until the deed was executed, after which he would have been an intruder and trespasser there. He had no licence to go to South-Molton Street after the 9th of November. If a person changes his chambers in the Temple he would send for letters to his former residence, but it would be very hard to say that he committed an act of bankruptcy in not going there. [*Scarlett*, A. G. The Chancellor has given judgment upon this very point, as appears from the short-hand-writer's note. Lord *Tenterden*, C. J. It does not come to us properly accredited.]

F. Kelly, on the same side. By the 83d section of the late statute, the issuing of a commission is made notice to all the world for several purposes. Many questions involving property to a great extent have been decided upon this clause, or upon similar provisions in former statutes. This might work great injustice; for how can persons take notice, that the commission issued in the present form was in reality a commission not against *Chambers* and Co. the bankers, but against *White* and Co. the pozzolana-manufacturers? A commission might thus have the effect of directing the attention of the public to quite different persons from those against whom it was really taken out (*a*). In *Herbert, Ex parte*, the allegation of "seeking his living by buying and selling" was the statement of a particular mode of trading pointed out by the act. That is a matter of fact. Here, if the trading can be made out at all, it must be a conclusion of law.

The alleged act of bankruptcy is open to this observation—that the motive of the absence of young *Chambers* from the office in South-Molton Street is explained by the clause in the deed. He had nothing to do there but to come when he was required by the trustees. After the revocation of the letter of licence he had no business there.

(*a*) *Vide Stevens* v. *Elisée*, 3 Campb. 256.

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[*Bayley*, J. He went for the letters. Lord *Tenterden*, C.J. He leaves his books and papers there.] There was no covenant by young *Chambers*, as by old *Chambers*, to attend. The difference between the effect of the acts of old *Chambers* and young *Chambers* was not pointed out to the jury. The learned judge told them that although any thing *accompanying* the act of bankruptcy would be evidence against all the world, and that the conduct of the parties since the commission, as the claim of protection by young *Chambers* immediately after the bankruptcy, might be taken into consideration, yet what he *said* after the time of the supposed act of bankruptcy is not evidence for the defendants (*a*).

Scarlett, A. G. It is an important question whether a bankrupt, by contracting new debts, shall enable creditors to dispute a commission which the bankrupt himself could not have disputed.

Cur. adv. vult.

Lord TENTERDEN, C. J. afterwards delivered the judgment of the Court. After stating the objection to the form of the commission, his Lordship said "We think that the word "bankers" as there used, may be considered as a description of the *person;* that it is not necessary that the particular species of trading should be set forth; and that the commission would have been good, if "esquires" or "gentlemen" had been substituted for "bankers." This objection therefore fails.

The second ground of the application for a new trial is, that no such evidence was given of an act of bankruptcy committed by *Chambers*, junior, as ought to have been left to a jury. The plaintiff's answer to this objection at the trial was, that the connection between *Wilton* and *Chambers* senior was such as to preclude *Wilton* from disputing the commission as against *Chambers*, senior; and that he was therefore equally estopped from disputing the commission

(*a*) *Vide Smallcombe* v. *Bruges*, M'Clel. 45, more fully reported 13 Price, 136.

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as against *Chambers*, junior. We think that however this may be with respect to *Wilton*, the other defendants, who are not bound by any such estoppel, have a right to require the plaintiffs to establish a valid commission, by shewing acts of bankruptcy committed by both. If *Chambers*, junior, committed an act of bankruptcy, it must have been by absenting himself; but this has been hitherto confined to the case of a party absenting himself from his regular place of business, at which a man would be expected to be found, or from one or more particular creditors; for instance, the Royal Exchange, where he expected to meet the persons to whom he was indebted; going behind the scenes at the theatre to avoid them; and so on. Now there was, at the time at which this act of bankruptcy is supposed to have been committed, really no place of business, properly so called, to which the younger *Chambers* could have occasion to resort. The business of the banking-house had, for a considerable time before, been placed under the management and control of a committee; and so long as the committee continued to act, so long the younger *Chambers* attended upon them at their meetings whenever they wanted him. The committee, under a clause in the deed, put an end to the trust, and revoked the deed; the consequence of which certainly was, that the books and all the concern would return and devolve again upon the two *Chamberses*. But it does not appear that there was any business for either of them to transact at this place in South-Molton Street. It is true, their names were over the door, but there does not appear to have been any thing they could have done, or had occasion to do, by attending at that house. Inquiries were made for the younger *Chambers* there, and it appears that no person there could say where he was. Inquiries were also made for him at his father's, but there no information could be obtained respecting him. There is no proof, however, that he directed any person to either of those places, but that they inquired there in consequence of not being aware

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what was his place of abode. It appears that, after some time, a person came to the house in South-Molton Street, and fetched away such letters as had in the interval been left there for *Chambers* and Son; but what was his authority for so doing does not appear, nor whether it was at all under the direction of the younger *Chambers*. It further appears, that long before the time at which he is supposed to have committed an act of bankruptcy by absenting himself, he had a house in one of the Crescents in the neighbourhood of Tottenham-Court Road. He had been repeatedly seen in that house for some period previously to that. One sheriff's officer had known where to find him, and had arrested him there some time before; and other sheriff's officers, in whose hands writs were placed (for there were many writs out against both the father and the son), not being aware that he lived at that place, knew not where to look for him; and it appears further, that as soon as the commission issued he made his appearance, and took the benefit of it. Still we cannot allow the verdict to stand, if this evidence was not sufficient to justify the jury in coming to the conclusion that this party had committed an act of bankruptcy, within the meaning of the statute; and he not having absented himself, as far as we can judge from the evidence, from any place in which, in the ordinary course of his life and business, he would be expected to be present, namely, his place of abode, or any place in which he had business to transact, we think that the second objection ought to prevail, and that upon that objection, and that alone, there ought to be a new trial.

Rule absolute for a new trial (*a*).

(*a*) And see *Woodmason, Ex parte*, 1 Cox, 308; *Stevens* v. *Elizée*, 3 Campb. 256, and 1 Rose, 360; *Schofield, Ex parte*, 2 Rose, 246; *Beckwith, Ex parte*, 1 Glyn & Jameson, 20; *Smith, Ex parte, ibid.* 256; *Wride, Ex parte*, 2 Glyn & Jam. 99; *Parry, Ex parte, ibid.* 225; *Beadles, Ex parte, ibid.* 243; *Horsley, Ex parte*, 2 Madd. 11; *Day, Ex parte*, Mont. & Mac. 208; *Shadbolt, Ex parte*, Mont. 89; *Sambourne, Ex parte*, 2 Deacon & Chitt. 22; *Farebrother* v. *Worsley*, 1 Crompton & Jervis, 549.

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ISAAC v. IMPEY and others.

TRESPASS, for false imprisonment: Plea, not guilty, and issue thereon. At the trial before Lord *Tenterden*, C. J. at the London adjourned sittings after the last term, the case was this:—The defendants were commissioners under a commission of bankrupt, issued on the 13th of June, 1827, against one *Samuel Owen*. The plaintiff had been summoned before the defendants, as a person capable of giving information concerning the person, trade, dealing, and estate of the bankrupt. It appeared by the defendants' warrant of commitment that the plaintiff had been examined several times before them, in order to ascertain whether certain securities were affected with usury. At the last meeting he had been examined touching certain sums of money entered in his books of account, amounting together to 9000*l*., which was, as he had stated, composed of two sums, the proceeds of Russian stock, the property of a Mr. *Leon*. The examination then proceeded as follows:—

"Q. Does the account headed "Russian Stock" in ledger G., p. 101, contain an account of all the purchases and sales of Russian stock, for Mr. *Leon*'s account, made by you?

A. Yes, it does;—as well as of those purchased by Mr. *Leon* himself.

Q. Do you mean to state, that in such account there are entries of Russian stock purchased and sold—or purchased or sold,—by Mr. *Leon* himself, on his own account?

A. Yes;—both bought and sold by Mr. *Leon* himself.

Q. Refer to ledger G. and to the account in it headed, "Russian Stock."

A. I have now referred to it.

Q. You are now requested to *read* all the entries in that account.

A. Acting under the advice of my counsel, I demur to *answer* the *question*, inasmuch as the matters in that account

Commissioners of bankrupt have no authority to commit an examinant for refusing, upon request, to read an entry in a book.

An examinant being requested by the commissioners to read an entry in a ledger, and refusing to do so, was by them committed "for refusing to answer a question:"—Held, that the request to read was neither in form nor substance a question; that the commitment was illegal; and that an action of trespass against the commissioners for the imprisonment was maintainable.

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are not relating to the bankrupt, *Owen*. It is, therefore, I submit, with the advice of my counsel, that I am not bound to read the entry; and I request the commissioners to allow me to consult my counsel on the propriety of the *question* put, so that I may give a proper and legal *answer* to it. But in case the commissioners refuse, I request that my counsel may be allowed to enter, for me, such proper protest as he may see necessary. When I say that I demur to *answer* the *question*, I mean to say, that I refuse to comply with the request to read the entries contained in the account alluded to."

The warrant then concluded in these terms:—

"Which last *question* the witness having so refused to *answer*, these are, therefore, &c. him to keep without bail &c., until such time as he shall submit himself to us, the said commissioners, and full *answer* make, to our satisfaction, to the *said question*."

Lord *Tenterden* was of opinion, that the request to the plaintiff to read the entries was not a question either in form or substance, and, therefore, that the warrant, which purported to commit the plaintiff for not answering a legal question, and to require his detention until such supposed question should be answered, was illegal.

The jury having found a verdict for the plaintiff, with 250*l.* damages,

F. Pollock now moved for a new trial. First, this action is not maintainable at all against these defendants. It was decided by this Court, in the case of *Doswell* v. *Impey* (*a*), that trespass will not lie against commissioners of bankrupt for committing a witness to prison for not satisfactorily answering questions put to him while under examination, even though the questions may appear to the Court to have been satisfactorily answered. [Lord *Tenterden*, C. J. The objection here is, that the plaintiff was committed for not

(*a*) 2 D. & R. 350; 1 B. & C. 163.

answering a question, when, in fact, no question was asked of him.] It is submitted that the commissioners did, in substance, ask the plaintiff a question, when they desired him to read the entries in a particular account. The expression of that desire must have given the plaintiff to understand that the commissioners required information respecting that account; and the mode in which that information was sought for, though not strictly in the form of a question, was really one in substance. It is clear that the plaintiff so understood the language of the commissioners, for he says expressly, "I demur to answer the question." [*Bayley*, J. He explains that by adding, "When I say that I demur to answer the question, I mean, that I refuse to comply with the request to read the entry." The commissioners had done no more than request the plaintiff to read an entry, which they might equally well have read themselves (*a*).] The language of the warrant, namely, that the witness refused to answer a *question*, is satisfied, if it appears that the mind of the witness was informed that the commissioners required *information*, and he withheld it. Here, the plaintiff must have known that the commissioners did not want him to read the entry, but to give them an *explanation* of its contents. The refusal to comply with that request, was a refusal to give the commissioners the information they required, namely, an explanation of the entries in the account. In *Davie* v. *Mitford* (*b*) a bankrupt who had been committed for not *producing a balance-sheet*, was held to have been properly committed. Although his was not, in strictness, a commitment for not *answering a question*, that case is analogous to the present, and seems to justify the application which is now made.

Lord TENTERDEN, C. J.—The authority of commissioners of bankrupt to commit persons summoned before

(*a*) The examinant would rather appear to have been directed to read the entries *to himself* as preparatory to further questions being put with respect to such entries.

(*b*) 4 Barn. & Alders. 356.

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them to give evidence touching a bankrupt's estate, depends entirely upon the Bankrupt Act, 6 *Geo.* 4, c. 16; and to that we must look for the purpose of seeing in what cases they are authorized to commit. Now, the only two cases in which that statute authorizes them to commit witnesses are, first, for a refusal to answer lawful questions respecting the bankrupt's estate; and, secondly, for a refusal to produce books or other documents (*a*). It is impossible to say that the plaintiff in this case came within either of those predicaments; he did not refuse to answer any question; he did not refuse to produce any book or document. All that he did was, to refuse to read an entry in an account which he had produced, and which the defendants might have read for themselves (*b*). The Bankrupt Act does not give the commissioners power to compel a witness summoned before them to read documents; much less does it give them power to commit such a witness for refusing to read an entry from a document which he has produced before them. It seems to me that no man of plain common sense can contend that requesting a person to *read an entry* in an account, is *asking him a question.*

BAYLEY, J.—If the plaintiff, after notice, had refused to produce his ledger, and had thereby prevented the commissioners from reading the entries, they might have committed him, and he would not have been entitled to his discharge until he had produced it. The warrant of commitment states that the plaintiff was committed for refusing to *answer a question;* the examination, on the contrary, shews that the commissioners requested him to read certain entries in a book, and that he refused to do so. It is quite impossible to say that the requesting the plaintiff to read those entries was, either in form or substance, putting a question to him; and if so, the commitment was clearly illegal,—for he has been committed for refusing to answer a question which was never asked him.

(*a*) *Vide* section 34. (*b*) *Vide suprà,* 379 (*a*).

LITTLEDALE, J. and PARKE, J concurred.

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Rule refused (*a*).

(*a*) See *Ex parte Isaac, in re* Owen, a bankrupt, 3 Y. & J. 38, which was an application to the Court of Exchequer to discharge the plaintiff in the principal case out of custody, upon the ground that his commitment, (the same stated in the principal case,) was illegal. That Court discharged the applicant out of cutody, holding, that commissioners of bankrupt have no authority to commit a witness for refusing to read an entry in a book; and holding also, that refusing to read an entry was not refusing to answer a question.

ROBERTSON *v.* KENSINGTON and another.

TROVER, for coffee-warrants. Plea: not guilty; and issue thereon. At the trial, before Lord *Tenterden*, C. J., at the London adjourned sittings after Michaelmas term 1828, the case was this:—

The right of a factor, under 6 *G.* 4, c. 94, s. 5, to pledge the goods of his principal, depends upon the question whether, upon the face of the *whole* account between them, the principal is indebted to the factor.

A factor, by desire of his principal, kept separate accounts of sales, in some of which the principal was solely, and in others but partly, interested; but he regularly posted all the items of both those accounts into one general account. The factor pledged goods consigned to him on the joint account, for the purpose of meeting a draft drawn on him by his principal against that account. At the time of the pledge, the factor, upon the general account, was indebted to his principal in a larger sum than the amount of the draft; but upon the separate account, against which the draft was drawn, and to which the goods pledged belonged, the principal was indebted to his factor. Held, that the factor had no right to pledge, and that the pledgee could not retain the goods against the principal.

Where, in such a case, the principal for some time after notice of the pledge, forbore to make any demand upon the pledgee:—Held, that such forbearance was not an acquiescence in the pledge,—and that in the absence of any evidence to shew that the effect of such forbearance had been to alter the situation of the pledgee for the worse, or that of the principal for the better, the right of the principal against the pledgee remained entire.

The plaintiff was a merchant at Perth, where he carried on business jointly with the firm of *Young, Ross* & Co., in which he was a partner, and also separately on his own account, and was in the habit of consigning to *Fennell* & Son, commission-agents in London, various goods for sale on commission, some belonging to his firm jointly, and others belonging to himself separately. The goods, when received by *Fennell* & Son, were, at the plaintiff's desire, distinguished by them by marks in their accounts-sales, the

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goods belonging to the firm being carried to an account called the *H. R.* account, and those belonging to the plaintiff to one called the *H. F.* account. Both, however, were posted up into one general account with the plaintiff. *Fennell* & Son had no direct correspondence or dealing with any other of the firm of *Young, Ross* & Co. In 1826 *Fennell* & Son received a consignment of coffee on the joint, or *H. R.*, account, for which they procured the delivery-warrants, the subject of the action, in the usual course. Shortly afterwards they received a letter from the plaintiff, in which he said, "To reimburse Mr. *Hunter* for some payments, I have this post sent him my draft on you at three months for 1278*l.* 10*s.*, on account of the *H. R.* account; which please honour: if you are not in funds when it becomes due, it can be renewed." The bill there mentioned was accepted by *Fennell* & Son, and became due on the first of May, when they, not being in funds, applied to the defendants, who were brokers in London, for an advance of money to meet the bill, offering to deposit with them as a security the coffee-warrants in question. The defendants thereupon gave their acceptance for 1300*l.* to *Fennell* & Son, who got it discounted, and with the proceeds paid the bill due to *Hunter*; and *Fennell* & Son delivered to the defendants the coffee-warrants in question. The defendants were informed that the advance was wanted to take up the plaintiff's bill, and it was stated to them by one of the *Fennells*, that it would be a great injury to them if that bill was not taken up. At this time *Fennell* & Son were indebted to the plaintiff on the *whole* account, in 1500*l.*; but if the two accounts were separated, there was, upon the *H. R.* account, a small balance due from the plaintiff to them. *Fennell* & Son afterwards became bankrupts, and in September 1827, they, for the first time, informed the plaintiff of their having pledged the warrants with the defendants. The plaintiff then desired that no demand should be made on the defendants for the warrants until he had settled accounts with the *Fennells*; and no such demand was in fact made till the end of October

1827; and then no offer was made by the plaintiff to satisfy any supposed lien of the defendants. In April 1824 the plaintiff had written to *Fennell* & Son, saying, "For the account of the *H. R.* I inclose the following, per *Alfred*, &c. I inclose two bills of lading for a different account, say *H. F.*, and these you will keep entirely *separate and apart*, taking *my* instructions and holding the proceeds at *my* disposal." In point of fact, the accounts of sales had been kept distinct *before* the receipt of this letter, and no alteration was made *afterwards* in the mode of posting the accounts, the whole being brought into one general account with the plaintiff as before.

It was contended on the part of the defendants, first, that as the goods consigned to *Fennell* & Son belonged to two sets of persons, whose distinct interests in them were known to the consignees, who were expressly required, by the plaintiff himself, to keep separate and distinct accounts for each, they, as factors, had a right to do so, and to insist on their lien for the balance due to them on the account to which the coffee belonged at the time of the pledges, (which was the *H. R.* account), and, consequently, that the defendants were entitled, under statute 6 *Geo.* 4, c. 94, s. 5 (*a*), to set up that lien as a defence to the action; secondly, that the plaintiff was by his own conduct estopped from denying the right of the defendants to set up such lien, because by neglecting to demand the warrants as soon as he knew of the pledge, he had in effect assented to and affirmed it; that, at any rate, his demand came too late, for that he had no right to lie by for a period during which the

(*a*) Which enacts, "that it shall be lawful to and for any person to accept and take any goods, &c., in deposit or pledge from any factor or agent, notwithstanding such person shall have notice that the person making such deposit or pledge is a factor or agent; but that in that case such person shall acquire no further or other right, title, or interest in, upon, or to the said goods, &c., than was possessed or could have been enforced by the said factor or agent at the time of such deposit or pledge; but that such person shall and may acquire, possess, and enforce such right, title, or interest, as was possessed and might have been enforced by such factor or agent, at the time of such deposit or pledge."

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situation of the parties, either way, might have been materially altered.

Lord *Tenterden*, C. J., was of opinion,—first, that as the dealings of *Fennell* & Son were with the plaintiff alone, as it was for his use only that the goods were distinguished by separate accounts, (apparently for convenience,) which were all, as between the factors and the plaintiff, brought into one general account, upon which they were indebted to the plaintiff, the plaintiff had as against them, and, therefore, as against the defendants, the legal title to the whole; and that the defendants had no right to insist upon a lien as to a particular portion of them;—secondly, that the mere neglect of the plaintiff to demand the warrants for some time after he was informed of the pledge, could not be taken as an assent to or affirmance of the pledge,—at least without evidence to shew that the situation of the defendants had been made worse, or that of the plaintiff better, by means of the delay: and no evidence of that sort being given on the part of the defendants, the jury, under his Lordship's direction, found a verdict for the plaintiff. A rule nisi for a new trial having been obtained in the following term upon both points,

Scarlett, A. G., and *Campbell*, now shewed cause. It is clear that the statute (*a*) gave the defendants no authority to hold the warrants against the plaintiff, unless *Fennell* & Son, the factors, who pledged them, had themselves a lien upon them against the plaintiff, *at the time of the pledge*. Now *Fennell* & Son had no lien at the time of the pledge. It was in evidence that at that time *Fennell* & Son were indebted to the plaintiff, upon the *whole* account between them, in a larger sum than that for which the warrants were pledged. By what right can the defendants assume to dissect that account, distributing some of the goods to *H. R.*, and others to *H. F.*, merely to suit their own purpose in saying, "these warrants belonged to *H. R.*?" As against

(*a*) 6 *Geo.* 4, *c.* 94, *s.* 5. See the preceding note.

Fennell & Son, and, consequently, as against the defendants, who can stand only upon the rights of *Fennell* & Son, all the goods were the property of the plaintiff, by whom, exclusively, *Fennell* & Son were employed; though it might be necessary, for his own convenience, that he should direct his agents to distinguish the several accounts. If the warrants had remained in the possession of *Fennell* & Son, the plaintiff might have sued them for them in his own name only, and they would have had no answer to the action.

Then it is said that the plaintiff has *acquiesced* in the pledge, and cannot now dispute its legality. There is no evidence to support such a proposition. All that the plaintiff did, was to delay demanding the warrants from the defendants, until he had, by an investigation of the accounts between himself and *Fennell* & Son, ascertained whether the latter had any lien upon the warrants, which could by means of the pledge have passed to the defendants; and having satisfied himself that no such lien existed, he made a demand of his property, and upon a refusal brought the present action. It is impossible to hold that this amounted to an acquiescence in the pledge, and therefore, upon both the points made at the trial, the plaintiff is entitled to retain the verdict.

Denman and *Hibbert*, contrà. It is admitted on the other side that the accounts were kept distinct by the express direction of the plaintiff himself; therefore it cannot be urged as an argument in his favour, that those accounts were afterwards posted into one general account. He had always the means of ascertaining at once what was the exact state of each account, though both might be transmitted to him upon one sheet of paper. The subsequent reduction of the two accounts into one general account, cannot alter the legal character of the original arrangement. The plaintiff had the benefit of the 1300*l.* advanced by the defendants upon the warrants; and his bill, to provide for which that money was so advanced, was drawn specifically

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against the *H. R.* account, to which the goods represented by the warrants belonged; and, but for the money procured by means of the pledge, the plaintiff must have paid that bill himself. [Lord *Tenterden*, C. J. The *Fennells* clearly considered that they were borrowing the money for their own accommodation, for they said at the time, that it would be a great injury to *them* (*a*) if the bill was not paid.] The *Fennells* had once a lien as against the plaintiff upon the *H. R.* account, and nothing having been done to satisfy or destroy that lien, it passed to the defendants by operation of the statute. As to the affirmance of the pledge, the plaintiff, by not interfering after he knew of the pledge, must be taken to have acquiesced in it. Whether the situation of either party was improved or otherwise, is not the question; the plaintiff had no right, by his silence, to lead the defendants to suppose that he acquiesced in the pledge; and having done so, he must not now be allowed to evade the consequences of his own neglect.

Lord TENTERDEN, C. J.—I am of opinion that the plaintiff is entitled to retain the verdict in this case. All the goods that came to the hands of *Fennell* & Son, came to them directly *from the plaintiff*. He was the only person with whom they had any correspondence or dealing with relation to the goods, or with whom they kept any account. At his desire they made a distinction as to particular goods coming by particular ships. That was done in order that he might know how to charge or give credit to other persons jointly interested with him in those goods; but they also kept one general account with him; they made him debtor and creditor for every item, whether the goods came by one ship or another; in short, *he* was the only person with whom they dealt. Such being the relative situation of these parties, it is perfectly clear that *Fennell* & Son could have no right to separate the account, for

(*a*) The injury to the *Fennells* would have been the disclosure of their insolvency,—to the plaintiff the liability to take up his dishonoured draft,—from which he was redeemed by the advance made by the defendants on the coffee-warrants.

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the purpose of giving themselves a lien on a particular part of it; but that, as between them and the plaintiff, they could look only to the *whole* account, and that if, upon the face of that, they appeared indebted to the plaintiff, they had no lien, and consequently could transfer none to the persons to whom they professed to make the pledge.

But it has been urged on the part of the defendants, that the plaintiff, by forbearing to give notice that the goods were his as soon as he heard of the pledge, acquiesced in and affirmed it. The doctrine that a mere nonfeasance can operate as an act of confirmation, unless it be followed by certain consequences, I cannot concur in. If it had appeared in this case that the consequence of the plaintiff's forbearing to give notice had been an alteration in the defendants' situation for the worse, or even in his own for the better, there might have been ground for the argument; but nothing at all of that sort appeared upon the evidence. That being so, it seems to me that there is no ground for contending that the plaintiff by his forbearance acquiesced in the pledge.

The present rule, therefore, must be discharged.

BAYLEY, J. and LITTLEDALE, J. concurred.

Rule discharged (*a*).

(*a*) *Parke*, J. was gone to chambers.

COOPER *v.* J. MEYER and W. B. MEYER.

ASSUMPSIT, by the plaintiff as indorsee, against the defendants as acceptors, of three bills of exchange, one of which purported to be drawn by *Edmund Woodman*, payable to the order of the plaintiff, and indorsed in a fictitious name, the drawee undertakes to pay to the same person as indorser, who signed as drawer.

By accepting a bill payable to the drawer's order, drawn and indorsed in a fictitious name, the drawee undertakes to pay to the signature of the same person as indorser, who signed as drawer.

The indorsee of such a bill suing the acceptor, may, by comparison of the signatures, shew that the drawing and the indorsement are in the same hand-writing.

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able to his order, indorsed by him to *John Darby* & Co., and by them to the plaintiff; the others purported to be drawn by *Henry Ullock* & Co., payable to their order, indorsed by them to *John Darby* & Co., and by them to the plaintiff. Plea: non assumpsit, and issue thereon. At the trial before Lord *Tenterden*, C. J., at the London adjourned sittings after Michaelmas term, 1823, the case was this:—

John Darby was a tradesman, carrying on business under the firm of *John Darby* & Co. The defendants were in partnership as American merchants. The bills in question were, in point of fact, drawn by *Darby*. There was no person in trade of the name of *Edmund Woodman*. There was a person of that name, a relation of *Darby*, but he, being examined on the trial, stated that he had never authorized *Darby* to use his name. There was no firm of *Henry Ullock* & Co.; there was a firm of *Ullock, Lancaster* & Co., but a member of that firm being examined, stated that *Darby* never had authority to use their names. The bills thus drawn by *Darby*, were accepted by *J. Meyer*, one of the defendants, in the name of the firm, for the accommodation of *Darby*. Being accepted, *Darby* indorsed them: the bill payable to the supposed *Edmund Woodman* he first indorsed in that name, and afterwards in the names of *John Darby* & Co.; the bills payable to the supposed *Henry Ullock* & Co. he first indorsed in those names, and afterwards in the names of *John Darby* & Co. The bills thus indorsed were taken to a person named *Green*, a relation of the plaintiff, and were by him discounted for, and with the money of, the plaintiff. The defendant *J. Meyer* afterwards admitted to *Green*, in the presence of *Darby*, that neither he nor his firm ever had any dealings with the supposed drawers of the bills, and that he did not know of such a firm as *Henry Ullock* & Co. When this admission was made, the other defendant was abroad. A witness, called for the defendants, stated that he did not believe that the drawers' and indorsers' names were written by *Darby*. On cross-examination, he was asked, whether he believed the bills to have been signed and indorsed by the same person.

This was objected to as a comparison of hand-writing (*a*), but Lord *Tenterden* allowed the question to be put, and the witness answered it in the affirmative. His lordship then told the jury, that as there was no proof of the existence of such persons as *Woodman* and *Ullock* & Co., in whose names the bills were drawn, it was sufficient, as against the acceptors, to prove the indorsement to be in the same hand-writing as the drawing, which had been done; but he desired them to say, whether, upon the evidence before them, they believed the bills to have been drawn and indorsed by *Darby*. The jury said they did, and found a verdict for the plaintiff. In Hilary term, 1829, a rule nisi for a new trial was obtained, on the ground, first, that the question objected to at the trial should not have been allowed to be put; and secondly, that the case was not correctly left to the jury, inasmuch as it was competent for the defendants, as the acceptors, to dispute the regularity of the *indorsements*, although they admitted the bills to be regularly *drawn*, and although the bills appeared to be drawn and indorsed in the same hand-writing.

Scarlett, A. G. and *Campbell*, now shewed cause. It must undoubtedly be admitted as a general principle, that a mere comparison of hand-writing cannot be allowed as evidence of a particular written document; but this is a very peculiar case, and must be considered as excepted out of the general rule. But the question objected to in this case, was not strictly a comparison of hand-writing. The bills were evidently drawn in fictitious names, and the question asked of the witness was, not whether the bills were indorsed by one person or by another, but whether they were drawn and indorsed by the *same* person. That question seems unobjectionable; and the question left to the jury was equally so, for they were only asked whether they believed the bills to have been drawn and indorsed by *Darby;* and there certainly was ample proof to justify them

(*a*) *Vide* 2 Stark. Evid. 2d ed. 374, 6; 1 Phill. Ev. 7th ed. 490, 3.

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in finding that they were so. Under the circumstances of this case, it was not competent for the defendants, as acceptors of the bills, to dispute the validity of the indorsements. If a bill is drawn in favour of a fictitious payee, and that circumstance is known to the acceptor as well as the drawer, and the name of such payee is indorsed on the bill, an innocent indorsee, for a valuable consideration, may recover upon it against the acceptor; *Gibson* v. *Minet* (*a*), *Gibson* v. *Hunter* (*b*). So here, the defendants, by accepting the bills so drawn, recognized the authority of *Darby* to draw them in fictitious names, and also gave him authority, as against themselves, to indorse them in those names. Besides, here there was the admission of one of the defendants, (which was equally binding on both,) that he had accepted on the credit and for the benefit of *Darby*, and that he knew there were no such persons as the supposed drawers.

Gurney and *F. Pollock*, contrà. The bills were accepted by one of the defendants in the name of the firm in which they were partners; but they were drawn in fictitious names, and were in fact forgeries; and one partner cannot bind another by his acceptance of a bill which is a forgery. Neither ought the admission made by one of the defendants to be held binding upon the other, who was not present when it was made, but out of the country, and entirely ignorant of the transaction. The admission itself amounts to very little; it only shews that at *that* time the defendant *J. Meyer* knew of no such persons as the drawers, which is not inconsistent with the fact of his believing, at the time of the acceptance, that such persons existed. Although the defendant *J. Meyer* has by his acceptance precluded himself from disputing that the bills were duly *drawn*, it was still competent for him to dispute that they were duly *indorsed*; for the acceptance of a bill of exchange admits

(*a*) 1 H. Bla. 569; 3 T. R. 481; 2 Brown, P. C. 60, 2d edition.

(*b*) 2 H. Bla. 288; 6 Bro. P. C. 235, 2d edition.

merely the drawing, but not the indorsement of the drawer; *Robinson* v. *Yarrow* (*a*); where it was held, in an action by the indorsee against the acceptor of a bill, drawn and indorsed by procuration, that the indorsement by procuration *not* being proved, the plaintiff was not entitled to recover. That is an authority to shew that the indorsements in this case should have been proved in the regular way. The evidence that the drawings and indorsements were in the same hand-writing should clearly not have been admitted. If it were admissible in this case, it would be equally admissible in all others; for the acceptor is always precluded from disputing the hand-writing of the drawer.

Lord TENTERDEN, C. J.—I am of opinion that both the defendants are bound by these acceptances, for the knowledge and the act of one of them must, in such a transaction, be taken to have been the knowledge and the act of both. Now it is clear that the defendant *John Meyer* knew that he was accepting on the credit and for the benefit of *Darby*; and the jury have found as a fact that the bills were both drawn and indorsed by *Darby*. The acceptor of a bill is bound, and must therefore be presumed, to know the hand-writing of the drawer, and is consequently precluded from disputing it. But it is said that he may, nevertheless, dispute the indorsement. Where the drawer is a real person, he may do so; but where there is in reality no such person as the drawer, I think the fair and proper construction of the acceptor's undertaking is, that he will pay to the signature, as indorser, of the same person who signed as drawer. For these reasons I am of opinion that the verdict in this case was right, and that the rule for a new trial ought to be discharged.

BAYLEY, J.—The defendants ought not to have accepted the bills without ascertaining whether or not there were such persons as the supposed drawers, and if they chose to

(*a*) 1 B. Moore, 150; 7 Taunt. 455.

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accept without making that inquiry, I think they must be considered as undertaking to pay to the signature of the person who actually drew the bills.

PARKE, J.(*a*) concurred.

Rule discharged.

(*a*) *Littledale*, J. was gone to chambers.

HARRISON *v.* HODGSON.

Under particular circumstances, one man may be justified in laying hands upon another, for the purpose of serving him with process.

THIS was an action of trespass for an assault and false imprisonment, to which the defendant pleaded, first, not guilty; and secondly, that the plaintiff had first committed an assault upon him, whereupon he gave the plaintiff into the custody of a peace-officer, who was present. The plaintiff replied, that he was employed to serve the defendant with process, and in order to do so, *necessarily* laid hands on him, which was the same assault mentioned in the second plea. The defendant rejoined that the plaintiff had used more violence than was necessary; and thereupon issue was joined. At the trial beford Lord *Tenterden*, C. J., at the adjourned Middlesex sittings after the last term, a verdict having been found for the plaintiff,

J. Williams now moved in arrest of judgment(*b*), contending that the replication was bad, inasmuch as it could not have been necessary for the plaintiff to lay hands on the defendant for the purpose of serving him with process; and that, at all events, if any special circumstances had existed which did render that necessary, those special cir-

(*b*) *Quære*, whether the objection, if valid, would not have been ground for awarding a *repleader*, rather than for *arresting the judgment? Vide Anon.* March, 78, pl. 125; *Plomer* v. *Ross*, 5 Taunt. 386, and 1 Marshall, 95; Com. Dig. *Pleader*, (R) 18.

cumstances should have been fully set forth in the replication.

Lord TENTERDEN, C. J.—The defendant, by rejoining excess, has admitted, that if, in any supposable case, it can be necessary to touch a party in order to serve him with process, it was necessary in this case; and I am not prepared to say that it may not, under particular circumstances, be necessary and lawful to do so. There seems to me, therefore, no ground for arresting the judgment.

The other Judges concurred.

Rule refused (*a*).

(*a*) *Vide ante*, vol. i. 215 (*a*).

HOLDSWORTH *v.* JAMES HUNTER the younger.

A set of foreign bills, drawn abroad, was sent to the drawee, (who was also the payee,) the defendant, who accepted two parts, and indorsed one to the plaintiff for value, prior to which the other had been indorsed by the defendant to his father *conditionally*, but who had never insisted on payment, but gave it up on the substitution of other securities:—Held, that the plaintiff was entitled to recover, and that the bill did not require a stamp; held, also, by Lord *Tenterden*, C. J., and *Parke*, J.—dubitante *Littledale*, J.—that it would have been the same if the first part had been indorsed and delivered *unconditionally*.

ASSUMPSIT by the plaintiff as indorsee, against the defendant as acceptor of two foreign bills of exchange, one for 5000*l.*, the other for 4399*l.* 19*s.* 7*d.*, drawn by *M'Kenzie* and Co. in the following form:—

"£5000. Calcutta, 12th July, 1825.

"At six months after sight pay this our first of exchange, (second and third not paid,) to the order of Messrs. *William Hunter* and Co, the sum of five thousand pounds sterling, value in account per advice.

"*T. M. M'Kenzie* and Co.

"To Messrs. *James Hunter*, Jun. and Co., London."

Plea: non assumpsit;—and issue thereon. At the trial before Lord *Tenterden*, C. J., at the London adjourned sittings after Michaelmas term, 1828, the following appeared to be the principal facts in the case:—

The bills in question were drawn by *M'Kenzie* and Co.

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at Calcutta. In December, 1825, the defendant, *James Hunter*, who carried on business in London under the firm of *James Hunter*, jun. & Co., and was also a partner in the firm of *William Hunter* & Co., who carried on business in Glasgow, received the second parts of these bills, which he accepted and indorsed to his father, to whom the firm of *William Hunter* & Co. were largely indebted. In January, 1826, the defendant received the other parts of the bills, which he also accepted, and indorsed the first parts to one *Fennell*, who indorsed them to the plaintiff for value. The acceptances were ante-dated 14th November, 1825. At the time of the actual acceptance and indorsement of these last-mentioned parts, the parts first accepted were in the hands of the defendant's father; but other bills were afterwards substituted for them, and they were given up to the defendant. Upon these facts it was contended by *Scarlett*, A. G., on the part of the defendant, that the plaintiff could not recover, upon two grounds:—First, that the party who first obtained the acceptance of any one part of a set of bills, was entitled to the whole of them, all the parts of a set constituting, in fact, only one perfect bill; and, consequently, that the plaintiff had no right to those parts upon which the action was brought; and in support of this proposition he cited a case of *Pereira* v. *Jopp and another* (*a*):—Secondly, that if, on the other hand, the de-

(*a*) Tried at Guildhall, before Lord *Kenyon*, in 1793, but not reported. The case, as stated by *Scarlett*, A. G., from a note taken by himself at the trial, appeared to be this:—

"The plaintiff declared in trover for a bill of exchange for 1000*l.*, drawn by certain persons in Jamaica upon the defendants, in favour of one *Mais*, and by him indorsed to the plaintiff. Notice had been given by the plaintiff to the defendant to produce the bill, which appeared to be the second of a set of bills drawn in favour of *Mais*, dated the 5th of December, 1792, and which was indorsed as stated in the declaration. It was proved, that on the 21st of October, 1793, more than ten months after the date of the bill, it was presented to the defendants for acceptance, and that they, upon a subsequent demand, refused to return it. It was then proved, on the part of the defendants, that one *Lieven* had absconded in Sep-

fendant was to be held bound by his acceptance of the second part, and consequently was estopped from saying

tember, 1792; that after he had absconded, the plaintiff purchased a debt due from *Lieven* to *Hunter* & Co. for ten shillings in the pound, and obtained the necessary power for attaching certain property of *Lieven*'s, then in Jamaica, in the hands of *Mais;* that before the attachments were laid against *Mais* in Jamaica, namely, on the 5th December, 1792, *Mais* had transmitted the first of the set of bills of which the second was now sought to be recovered, indorsed to *Lieven;* that in consequence of *Lieven*'s absconding, the letter inclosing such first bill did not reach either his hands or those of his assignees, he having been made a bankrupt, until the 8th of November, 1793; that in the meantime the plaintiff having heard of the transaction respecting the first bill of the set, and that it had not come to hand, sent out to Jamaica, and prevailed upon *Mais*, on receiving an indemnity, to indorse and transmit to him the second bill of the set, which arrived on the 31st of October, 1793, and was, when presented to the defendants, retained by them, in consequence of a notice given to them by the assignees of *Lieven* of the circumstances; and that a few days afterwards, the letter containing the first bill of the set indorsed to *Lieven*, was discovered. This bill the defendants produced, and it appeared to be the first of that set of bills of which the plaintiff claimed the second. Upon this evidence Lord *Kenyon* was of opinion that the defendants were entitled to a verdict, because the sum which the bill represented had never been attached in the hands of *Mais*, he having indorsed and transmitted the first bill to *Lieven* before the attachment could operate; consequently the property represented by that bill, and in the hands of the defendants as the drawers, was vested in *Lieven* or his assignees, and *Mais*, the indorsee, could not divest that property by indorsing the second bill to the plaintiff; the plaintiff, therefore, had no title to the money which these bills represented."

Mingay, who was of counsel for the plaintiff, then submitted, that if the plaintiff was not entitled to the 1000*l.*, the sum expressed upon the bill, he was at least entitled to the piece of paper which he had left in the possession of the defendants, and which they had refused to deliver up. But this Lord *Kenyon* denied, and cited a case of *Miller* v. *Race*, tried before Lord *Mansfield*, in which this very point was contested in an action of trover for a promissory note; and in which Lord *Mansfield* said, he could not bring himself to think for a moment that the man who had no title to the value of a bill or note, could recover in an action of trover for the paper merely, which was of no value whatever. Upon this, Lord *Kenyon* continued, Sir *Richard Lloyd* put this case to Lord *Mansfield*, whether if, instead of a piece of paper, a diamond ring had been given for a promissory

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that all the parts constituted only one bill, it must follow that such second part must be treated as altogether a separate bill, drawn, as well as accepted, in England, and therefore requiring a stamp; and that as the bills in question were not stamped, they were invalid. For the plaintiff it was answered, by *F. Pollock*, that it was a question to be left to the jury, whether there had ever been, in fact, a perfect unconditional *assignment* to the defendant's father of the parts first accepted, or whether they had merely been *deposited* with him until other bills could be substituted; because, in the latter case, as soon as those parts were restored to the acceptor, the right of the father ceased, and could not be set up in answer to this action. Lord *Tenterden*, C. J., concurring, left that question to the jury, directing them to find for the plaintiff if they were of opinion that the parts of the bills first accepted were deposited with the defendant's father only as securities till other bills could be substituted. The jury were of that opinion, and found a verdict for the plaintiff. In Hilary term, 1829, a rule nisi for a new trial was obtained, upon

note, the person who possessed the ring, though without title to the value it represented, might not bring trover for it? To this Lord *Mansfield* replied, that the case was very ingenious, and that he might not, perhaps, without some consideration, be able to answer it satisfactorily; but yet it did not shake his opinion that the plaintiff ought not to recover for the piece of paper under the circumstances of the case before him. *Mingay* then elected to be nonsuited."

The case of *Miller* v. *Race*, as reported in 1 Burr. 452, does not seem very well to answer the description above stated to have been given of it by Lord *Kenyon*. There, a bank note, payable to *William Finney* or bearer, was stolen out of the mail, in the night of the 11th of December, 1756, and on the 12th came to the hands of the plaintiff for a full and valuable consideration, in the usual course of his business, and without any knowledge that it had been taken out of the mail; he afterwards presented it at the bank for payment, and the defendant, being one of the clerks, stopped it; upon which an action of trover was brought; and upon a case reserved upon the point, whether the plaintiff had a sufficient property in the note to entitle him to recover, the Court were clear in opinion that he had, and that the action was well brought.

the grounds urged at the trial, and also upon the ground that the point ought not to have been left to the jury as a question of fact. Against that rule,

F. Pollock and *Patteson* now shewed cause. The case of *Pereira* v. *Jopp*, which was cited at the trial, and will now be relied upon by the other side, has no analogy to the present case. In that case, the first part of the bill had passed to an indorsee for value; and the acceptor was allowed, on the indemnity of that indorsee, to resist the payment of the second, because he was considered to have accepted it for the benefit of such indorsee; therefore that action, though defended by the acceptor, was substantially an action between the holders of the two parts of the bill. It is material to observe, also, that in that case but one part was accepted, and that no intention was expressed or evinced by the acceptor to make himself liable upon more than one. Here, the defendant has accepted both parts of the bill; and he is defending the action, not on the bonâ fide title of a holder for value of one of them, but on the ground that he has fraudulently deposited one part with his father, with a power of redeeming it, having, in fact, redeemed it. He cannot be allowed to set up his own fraudulent act to defeat his own acceptance. Besides, the jury have found that the bill was deposited only till the defendant should redeem it, and substitute other securities for it, and not for the purpose of *payment* to the father. The defendant has, in fact, been charged only once, for the other parts of the bill have never been paid. Whether the *drawer*, if sued, could set up this defence is not the present question; it is enough that the *acceptor* cannot, for he, by his acceptance, has estopped himself from doing so.

Secondly, there is no weight in the objection respecting the stamp. A bill drawn in Calcutta, for acceptance in England, does not require any stamp. In order, therefore, to make a stamp necessary in this case, the bill must be considered as one made entirely in England. But it can-

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not be so considered, without making the defendant guilty of forgery, and he cannot be allowed to set up his own guilt as a defence to the action.

Scarlett, A. G., and *Campbell*, contrà. It is a principle recognized in the case of *Pereira* v. *Jopp*, that all the several parts of a foreign bill constitute together but one bill, and that the party who first acquires title to any one part has also a right of property in the other parts. In this case, one part of each bill was indorsed by the defendant to his father, for a valuable consideration; and though it was left to the jury, as a question of fact, whether they were so indorsed in order that the father might sue upon them, or only that he might hold them until other securities should have been substituted, there was no evidence before the jury of any agreement having been made one way or the other. In point of fact those parts remained in the father's hands, and he had the legal right to them at the time when the other parts were indorsed to the plaintiff. The property, therefore, in both was in the father, and it is immaterial that he afterwards exchanged the parts in his possession for other securities. The only way in which the plaintiff can get over this difficulty, or set up any right at all, is, by treating the two parts of the set of bills as separate and distinct bills, and even by doing that, he falls into an equal difficulty, though of a different kind. If the parts now sued upon are treated as separate and distinct bills, they must also be treated as bills manufactured entirely by the defendant in this country, not as forgeries upon the drawers in Calcutta, for it is not necessary to go that length, but as drawn in England in a fictitious name; and if so, they cannot be sued upon for want of a stamp. The case will then come within the principle of the decision in *Bathe* v. *Taylor*(*a*), where it was held, that a bill drawn on the 1st of August, at two months, by *A.* on *B.*, payable to

(*a*) 15 East, 412.

the order of the drawer, and accepted and re-delivered by *B.* as a security for a debt, and kept by *A.* for twenty days, could not be altered in its legal effect, by bringing forward the date twenty days, without a new stamp, though with the consent of the acceptor, and before indorsement and delivery to a third person.

Lord TENTERDEN, C. J.—The verdict of the jury, after my direction to them, must be taken to find as a fact, that the delivery of the first parts of the bills by the defendant to his father was not an absolute delivery, but conditional only, that the father would re-deliver them upon receiving other securities; and in my opinion that finding was well justified by the facts of the case. Those parts, therefore, which were the first accepted were not in fact paid, and cannot be considered as having constructively been paid, for they were redeemed by the substitution of other securities. What was there then to prevent the defendant from putting into circulation other parts of the bills? In that view of the case it seems to me quite clear that the plaintiff is entitled to recover; but I am inclined to go further, and to say that the plaintiff would have been entitled to recover, even if the delivery to the father had been absolute and unconditional. Suppose this case:—Two parts of a foreign bill come to the hands of the party who is at once drawee and payee. He accepts both, and indorses, first, one part to *A.*, and afterwards the other part to *B.* In a question between *them*, as to the right of property in the bills, *A.* might be entitled to both; but here the question is, whether the acceptor and indorser of both parts shall be allowed to defend himself against the holder of one part, on account of the previous circulation of the other. I am not aware of any principle of law upon which such a defence can be supported. But then it is contended that these bills must, by construction of law, be considered as drawn in England, and therefore liable to the stamp duty. To hold that, would be to place the law in direct opposition to the fact, for we know that the bills

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were actually drawn in Calcutta; and I think we ought not to strain the stamp act to favour such an objection as this. If the bills had been actually drawn in England, though purporting to be drawn in Calcutta, the case would have been different. I think this rule must be discharged.

BAYLEY, J.—There can be no doubt on which side the justice in this case lies, and I think there is no real difficulty in point of law to prevent our carrying that justice into effect. Where a bill is drawn in sets, the party claiming as holder ought to have *all* the parts, for the payment of any one part to another person may defeat him. In this case there were three parts, and it happened, from the circumstance of the same person being a partner in two firms, and at once the drawee and payee of the bills, that all the parts came into his hands, and he had the opportunity of dealing with them in these several characters. Of that opportunity he availed himself; for he accepted two of the parts, and the plaintiff claims as indorsee of one of them. The other was indorsed by the defendant to his father, and that indorsement had priority in point of time; and if it had been followed by an absolute and unconditional transfer of the bill, and payment had been actually made to the father, there might have been a difficulty in the case which does not now exist,—for the jury have found, and I think properly, that the indorsement and delivery to the defendant's father were conditional only; and as he did not insist upon payment to himself, but returned the bill to the defendant, upon receiving other security, the subsequent indorsement to the plaintiff is clearly available. The defendant, by his acceptance, undertook to pay that first of exchange, the second and third not being paid; they have not been paid, nor is there any person that has a valid claim upon them; it follows that the plaintiff is entitled to recover on the first.

LITTLEDALE, J.—I concur in the opinion that the plaintiff is entitled to recover. In the first place, I think that a

stamp was not necessary for these bills. They were bonâ *fide drawn* in Calcutta as foreign bills; they were intended to be treated as such, and what was done by the defendant in England cannot make them otherwise. Even if they are to be considered as binding upon the defendant by estoppel, as separate bills, they still cannot be treated as drawn in England. I feel, however, some difficulty in putting the case on this ground, for I doubt whether the doctrine of *estoppel* can be properly imported into a transaction taking effect according to the usage and custom of merchants. The three parts of each bill originally formed but one bill, and I do not see how the defendant could convert one bill into two or three. Still, upon the other ground, I think the plaintiff is entitled to retain the verdict. The defendant has accepted and indorsed two parts. He cannot be held liable upon both of them; but he must be liable upon one or the other. If the part first indorsed had been delivered unconditionally to the father, and the amount paid to him, the defendant would not have been liable upon the part subsequently indorsed to the plaintiff. But as the delivery to the father was conditional, and he afterwards waived his claim and gave up the bills, the indorsement of the other part to the plaintiff is binding.

PARKE, J.—I have no difficulty in concurring with the *rest of* the Court, that the plaintiff is entitled to recover. The action was brought upon two foreign bills accepted by the defendant, and the defence was, that he had before accepted another part of each bill, and indorsed it away for value. Assuming that to be so, (and I, for one, am of opinion that it was so,) I still think that, although the defendant had no power, after so doing, to create a fresh liability in the drawer, he might create a fresh liability in himself, and that he is estopped from disputing the regularity of his own acceptance. I cannot agree that the doctrine of estoppel is inapplicable to bills; for the general rule is, that the acceptor of a bill is estopped from disputing that the

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bill was regularly drawn. The simple question then is, whether there is any provision in the Stamp Act, 55 *Geo.* 3, c. 184, under which these bills are liable to stamp duty. Now they were clearly not liable as foreign bills, for they were not "drawn in, but payable out of, Great Britain;" nor were they liable as inland bills, for they were bonâ fide drawn out of Great Britain. *Snaith* v. *Mingay*(*a*) seems in point, where *Le Blanc*, J., said, "Whether this was a perfect bill in Ireland, is not so much the question as whether it was a bill drawn in England." So here, the question is, whether these bills were drawn in England; they clearly were not; and I agree that we ought not to extend the provisions of the Stamp Act to meet such a case, and favour such a defence as this.

Rule discharged.

(*a*) 1 M. & S. 87. There, a bill was drawn in Ireland, and blanks left for the date, sum, time when payable, and the name of the drawee, and transmitted to England, where it was completed and negociated. It was held, that this was to be considered as a bill of exchange from the time of signing and indorsing it in Ireland, and that an English stamp was not necessary.

WARD *v.* CONST.

A. the owner of a house which, in consideration of a premium paid to the lessor, and a covenant to repair and finish, had been demised to *B.* at a rent amounting to less than the annual value, redeems the land-tax thereon, under 38 *Geo.* 3, c. 5. *A.* is entitled to an annual payment from *B.* in respect of the difference between the rent and the annual value, viz. an annual payment bearing the same proportion to the whole land-tax redeemed, which the difference between the rent and the annual value bears to the annual value.

DEBT for 31*l.* 5*s.* for five quarters' rent of a messuage &c., demised by the plaintiff to *Jefferson* by indenture 29th September, 1799, and for 15*l.* (*a*) due from the defendant to the plaintiff on the 25th March, 1828, for two yearly payments of 7*l.* 10*s.* issuing out of the said messuage &c. Plea: nil debet. At the trial before Lord *Tenterden*, C. J.,

(*a*) That *debt* is the proper form of action in respect of the part of the demand, see *Underhill* v. *Ellicombe*, Madeland & Younge, 452.

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at the sittings at Westminster, in December, 1828, the plaintiff was nonsuited, with leave to move to enter a verdict. On the motion being made, it was agreed that the facts should be stated in a special case, which case was to the effect following:—

The plaintiff being seised in fee of a messuage &c., by indenture made on the 29th September, 1799, between the plaintiff and *Jefferson*, the plaintiff, in consideration of 520*l.* paid by *Jefferson*, and of the other charges which *Jefferson* would be at in repairing and finishing the premises, demised the same to *Jefferson*, *habendum* for 99 years, at the yearly rent of 25*l.*; and *Jefferson* thereby covenanted with the plaintiff and his heirs, that *Jefferson*, his executors, &c. would pay to the plaintiff and his heirs the said rent of 25*l.* The indenture contained the usual covenants to repair, and to deliver up in repair; but no covenant, condition, or stipulation respecting taxes or rates of any description. At the date of the lease the premises were assessed to the land-tax in 10*l.* being two shillings in the pound upon an estimated annual value of 100*l.* In 1800, the land-tax valuation was reduced to 90*l.*; this valuation continued at the time of the redemption of the land-tax thereon, at which time the assessment was 7*l.* 10*s.*, being 1*s.* 8*d.* in the pound.

21st February, 1800, by deed poll duly registered, the commissioners appointed under 42 *Geo.* 3, c. 116, for the city and liberties of Westminster, certified that they had contracted with the plaintiff for the redemption by him for 275*l.* three per cent. consols of 7*l.* 10*s.* land-tax, being the land-tax charged upon the premises, which premises were rated in the assessment for 1803 as follows:—

"*George Ward*, esq. proprietor—Received, *Joseph Jefferson*, occupier, 7*l.* 10*s.*"

The 275*l.* consols were duly transferred.

In 1819-22-23, *Jefferson* paid the plaintiff 7*l.* 10*s.* in addition to his rent. *Jefferson* dying in 1824, his personal representatives continued to pay the 7*l.* 10*s.* until the sale

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of the term by them to the defendants in May, 1826. The rack rent value of the premises in 1799 was 120*l.*, and they are not now of greater value, if any thing be payable by the defendant in respect of the redemption of the land-tax. Two years of such payment were in arrear on the 25th March, 1828.

Patteson for the plaintiff. By the first land-tax act, 4 *W. & M.* c. 1, after reciting (sect. 5,) that many of the manors, messuages, lands, tenements, and premises intended by that act to be charged with a pound rate, stood incumbered with or were subject and liable to the payment of several rent charges or annuities issuing out of the same, or to the payment of divers fee-farm-rents, rents-service, or other rents thereupon reserved or charged, by reason whereof the true owners of such manors &c., did not in truth receive to their own use the true yearly value of the same, for which nevertheless they were by that act charged to pay the full pound rate of four shillings for every twenty shillings of the true yearly value; it was enacted (sect. 6), that it should be lawful for the landlords and owners of such manors &c. as were charged with the pound rate aforesaid, to abate and deduct, and to retain and keep in their hands four shillings in the pound for every fee-farm-rent or other annual rent or payment charged upon or issuing out of the premises or any part thereof, or thereupon reserved; and all and every person and persons entitled to such rents and annual payments were thereby required to allow such deductions and payments upon the receipt of the residue of such moneys as should be due and payable to them, for such rents or annual payments reserved or charged as aforesaid. Thus each party interested was to bear the tax in proportion to his interest. The last annual land-tax act, 38 *Geo.* 3, c. 5, shews that the landlord is to pay only in respect of that sum which he actually received. The first land-tax-redemption act (*a*)

(*a*) 38 *Geo.* 3, c. 60.

gives to landlords the option of extinguishing the tax, or continuing it as a charge on the land. By 42 *Geo.* 3, c. 116, no such option is given, but the plaintiff is entitled to recover under sec. 123 (*a*) of that act. Where premises are improved, the landlord is liable only for so much of the land-tax as would have been payable in the state in which the premises were demised. *Yeo* v. *Leman* (*b*), *Hyde* v. *Hill* (*c*), *Whitfield* v. *Brandwood* (*d*), *Watson* v. *Home* (*e*). The 520*l.* consideration is to be considered, not as rent paid in anticipation, but as the purchase-money of an interest of which the purchaser becomes the owner, and in respect of which he is liable to be assessed as the party beneficially interested. Before this land-tax was redeemed, the tenant was entitled to deduct from the rent such part

(*a*) By which it is enacted "that where any person having any estate or interest, other than an estate of inheritance, in any lands &c., shall redeem the land-tax charged thereon out of their own absolute property, such manors, messuages, &c. shall be and become chargeable for the benefit of such persons, their executors, &c. with the amount of the three per cent. Bank annuities which shall have been transferred, or with the amount of the moneys paid as the consideration for the redemption of such land-tax, as the case may be, and with the payment of a yearly sum or sums of money by way of interest thereon, equal in amount to the land-tax redeemed. Provided always, that no person or persons in remainder, reversion or expectancy, or having any future interest in such manors, messuages, &c. who shall afterwards, in order of such succession, come into the actual possession, or be beneficially entitled to the rent and profits of any such manors, messuages, lands, tenements, or hereditaments, shall be liable to the payment of any yearly sum or sums of money by way of interest as aforesaid, save only for the time they shall respectively come into possession or be beneficially entitled as aforesaid: Provided also, that where the land-tax charged on any manors, messuages, &c. shall be redeemed by any persons having any estate or interest in remainder, reversion, or expectancy; such persons in remainder, reversion, or expectancy, shall in the meantime, until their respective estates and interests vest in possession by reason of the determination of the preceding estate, be entitled to have a yearly sum issuing out of such manors, messuages, &c. equal in amount to the land-tax so redeemed."

(*b*) 2 Stra. 1191, *S. C.* 1 Wils. 21.

(*c*) 3 T. R. 377.

(*d*) 2 Stark. N. P. C. 440.

(*e*) *Ante*, vol. i. 191; *S. C.* 7 Barn. & Cress. 285.

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only of the land-tax as bore the same proportion to the residue of such land-tax, as 25*l.*, the rent reserved, bears to 100*l.*, or 90*l.*, the amount at which the premises were valued. The landlord is not bound to pay land-tax in respect of the premium. By 42 *Geo.* 3, c. 116, s. 10 and 19, a tenant for a term of years, granted on a fine or premium, is treated as a person interested in the redemption of the land-tax, which he could not be if he were not the party liable to *pay* such portion of the tax.

Follett contrà. Before the redemption of the land-tax the tenant was not bound to pay any part of this assessment, and no new liability can be thrown upon him by the landlord's choosing to redeem. The former part of section 123 (*a*) of 42 *Geo.* 3, c. 116, applies to redemption by tenants of particular estates, and the latter part of the section applies to persons in remainder, reversion, or expectancy, and not to persons in the actual possession or immediate receipt of the rents and profits, otherwise the *whole* burthen would be thrown on the tenant, whether a fine were paid or not. If the plaintiff is entitled to any thing under this statute he is entitled to the *whole* assessment; which would be absurd. [*Parke*, J. The land-tax can be considered as redeemed by the plaintiff in his character of reversioner in respect of that part of the assessment only which the defendant might have redeemed under 42 *Geo.* 3, c. 116, s. 123.] The fine was not paid in respect of a particular and distinct portion of the property. Neither the 123d nor 125th section applies to a redemption by a party entitled to receive rent. By 4 *W. & M.* c. 1, s. 4(*b*),

(*a*) *Suprà*, 405 n.

(*b*) Which enacts "that all manors, messuages, &c., quarries, &c. and all hereditaments of what nature or kind soever they be, situate, lying, and being, happening or arising within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, or within any of the counties, cities, boroughs, towns, divisions, ridings, hundreds, lathes, wapentakes, parishes, and places thereof, as well within ancient demesne and other liberties and privileged places as without, shall be and are hereby

the land-tax was laid on the owner. The tenant is not chargeable, except where the value has been increased *after the granting of the leases*, and the assessment has been made upon a value exceeding the value of the premises of the landlord. In the cases cited such improvement had been made. Here no such improvement appears.

Cur. adv. vult.

On the following day the judges delivered their opinion seriatim.

BAYLEY, J.—There are two questions in this case; first, in what condition did the lessee stand in respect of the land-tax assessed on these premises, when the lease was executed? Secondly, whether, supposing the lessee to have been then liable to pay any part of the assessment, the plaintiff, after having redeemed the whole, has a right to sue for such proportion as the lessee was previously liable to pay.

charged for one year only, and no longer, with the sum of four shillings for every twenty shillings of the full yearly value, and so in proportion for any greater or lesser value; and all and every person and persons, bodies politic and corporate, guilds, misteries, fraternities, and brotherhoods, (whether corporate or not corporate) *having or holding* any manors, messuages, &c. shall yield and pay unto Their Majesties the sum of four shillings by every twenty shillings by the year, which the said manors, messuages, &c. are now worth to be leased, if the same were truly and bonâ fide leased or demised at a rack rent, and according to the full true yearly value thereof, without any respect had to the present rents reserved for the same, if such rents have been reserved upon such leases or estates made, for which any fine or income hath been paid or secured, or have been lessened, or abated upon consideration of money laid out, or to be laid out in improvements, and without any respect had to any former rates or taxes thereupon imposed, or making any abatement in respect to reparations, taxes, parish duties, or any other charges whatsoever; which said sum of (four and twenty shillings for the yearly profits of every 100*l.* value of all personal estates as aforesaid, and) four shillings for every twenty shillings by the year of the said true yearly value of all other the premises, shall be assessed, levied and collected in manner hereinafter mentioned, and shall be paid into the Receipt of, &c. by quarterly payments, the first payment thereof, &c."

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First point: Situation of lessee before redemption of land-tax.

I. The situation of the lessee before the redemption, depends upon the land-tax act in operation at the time when the land-tax redemption act passed, viz. 38 *Geo.* 3, c. 5, which provides that all lands, and all persons having or holding lands, shall be charged, with as much equality as possible, with a pound-rate. It was suggested by Mr. *Follett* that the tax was imposed on the landlord. There are no words imposing it on the landlord, but on *lands* and on persons *having and holding* such lands. These words would apply to persons receiving rents, and I think the right construction would be, that if, instead of being entitled to the whole, one person is entitled to a limited extent only, and another to the residue, (and the words are sufficiently accommodating,) to bring in both. Immediately after this lease was granted the lessee had land of the annual value of 120*l.* on paying 25*l.* And it might be said that the landlord was the person "having and holding," as to 25*l.*, and the tenant as to the residue. The 4 *W.* & *M.* c. 1, imposed the burthen on the land; and persons "having and holding" are directed to pay. The law would be the same if the lease had been made whilst that act was in operation, at the rent of a peppercorn. Mr. *Follett* says, that, to a certain extent, the *landlord* is liable: that is not so, the *land* has to pay, and the party who pays must have the rents and profits to pay it with. If, when there is a nominal rent, the tenant is to provide the fund, the argument must equally hold where the rent, though not nominal, is below the real value. It is only a question of degree. Here, justice would require that the landlord should pay in the proportion of 25 to 95. This does not, however, stand on these words alone; it is clearly explained by 38 *Geo.* 3, c. 5, s. 17, by which the several tenants of all houses, lands, &c., rated by virtue of that act, are to pay such sum as shall be rated thereon, and to deduct out of the rent so much of the said rate *as the landlord ought to pay*, and the landlords, mediate and immediate, are to allow such deduction upon payment of the residue of their respective

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rents. The tenants of the land are required and authorized to do two things,—*required* to pay, and *authorized* to deduct (*a*). The deduction should be, not of the whole, but of so much as the landlord, in respect of the rent, ought to bear upon receipt of the residue of the rents—put the case of lord, mesne, and tenant—the lord receiving 20*l.* rent, the mesne 40*l.*, and the tenant "having and holding" land of the annual value of 100*l.*, each would have to pay in proportion to his interest. So no doubt, on the execution of this lease, *Jefferson* was liable to contribute in respect of 95*l.* and *Ward* only in respect of 25*l.*

Second point: Remedy of redeeming lessor.

II. This principle being established, no difficulty remains, provided the statute under which the plaintiff redeemed contains sufficient words to support this action. It seems to me that the plaintiff is entitled under 42 *Geo.* 3, c. 116, s. 123 (*b*); but that, under that enactment, he cannot claim more than a proportion. The plaintiff having carved out this interest cannot complain of this payment, because it was made for his benefit: the words of the section are, "that where the land-tax charged on any manors, messuages, &c. shall be redeemed by any person having any estate or interest in remainder, reversion, or expectancy, such person in remainder &c. shall in the meantime, until his estate and interest vest in possession, by reason of the determination of the preceding estate, be entitled to have a yearly sum issuing out of such manors, messuages, &c. equal in amount to the land-tax so redeemed." No doubt the plaintiff, when he redeemed this land-tax, was a person "in reversion" (*c*). The difficulty pressed upon our consideration was, that the plaintiff would be entitled to a sum equal in amount *to the land-tax redeemed;* but he is himself made liable to the payment of *part*, and therefore could not claim from the tenant repayment of that part.

(*a*) And see *Rex* v. *Mitcham*, Caldec. 276; 3 Burn, 194, 24th edition. And as to the power of distress given by this section, see *Rex* v. *Clarke*, 4 Nev. & Mann. 671.

(*b*) *Vide suprà*, 405 n.

(*c*) *Sed vide suprà*, 406, per *Parke*, J.

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Looking at the substance of the transaction, the redemption has *extinguished* that portion of the land-tax which the party redeeming would have had to pay, and in justice the land-tax should be considered as *redeemed* as far as the landlord was liable, and as *subsisting* as far as the tenant was liable, and the landlord should receive from the tenant a sum equal in amount to that portion of the land-tax from which the tenant was liberated by the purchase. I think, therefore, that the plaintiff is entitled to 10*l.*, that sum being two-thirds of the whole assessment. This is exactly in conformity with the cases of *Yeo* v. *Leman* (*a*) and *Hyde* v. *Hill* (*b*), though in those cases the *assessment* to the land-tax was *increased*. The language used by the judges in those cases shews that the landlord was considered as liable to bear the tax only in proportion to the rent which he receives.

LITTLEDALE, J.—The first question is, whether this is a landlord's tax or a tenant's tax. It has generally been considered as a landlord's tax; it is, however, incorrect to consider it wholly so. By 4 *W. & M.* c. 1, s. 13, "the several and respective tenants of all and every of the manors, messuages, &c. which, by virtue of this act, shall be chargeable with any pound-rates as aforesaid, are hereby required and authorized to pay such sum or sums of money as shall be rated upon such manors, messuages, &c., and to deduct out of their rents so much of the said rates as in respect of the said rents payable for such manors, messuages, &c. the landlord should and ought to bear." There is no material difference between 4 *W. & M.* c. 1, and 38 *Geo.* 3, c. 5. The words "having and holding" are applicable to *all* estates whatever, from a fee-simple to a lease for a year. The tenant is thereby authorized and required, that is, he is *authorized* to deduct the proportion which the landlord ought to pay in respect of the rent. It seems to be a legislative enactment that the tenant is to pay, though not di-

(*a*) *Supra*, 405. (*b*) Ibid.

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rectly. It is a landlord's tax only in respect of the rent which the landlord has to receive. Any other construction would make the enactment unreasonable. There might be 20*l.* to pay, and only 5*l.* to receive; so, if the amount of the tax is increased by improvement of the value. *Watson* v. *Home* (*a*), *Whitfield* v. *Brandwood* (*b*). The 42 *Geo.* 3, c. 116, s. 10, directs, "that it shall be lawful for all other persons having any estate or interest in any manors, messuages, &c., whereon any land-tax shall be charged, except tenants at rack-rent for any term of years, or from year to year, or at will, to contract and agree for the redemption of such land-tax, or any part thereof." By the 123d sec. (*c*) of that statute (upon which it is said that the plaintiff is entitled to recover), it is provided "that where the land-tax charged on any manors, messuages, &c. shall be redeemed by any person having any estate or interest in remainder, reversion, or expectancy thereon, such person shall in the meantime, until his estate and interest vest in possession, be entitled to receive a yearly sum issuing out of such manors, messuages, &c. equal in amount to the land-tax so redeemed." I entertain, however, considerable doubt whether the plaintiff falls within the 123d section, and can be considered as a *reversioner* (*d*). It seems to me rather to apply to those who have merely future interests. A distinction is made between persons being entitled to rents and persons having a reversion: it would rather appear to me that a person being in the beneficial enjoyment of the property is not a *reversioner* within the meaning of this section. This does not signify much, because it may be considered as a general purchase of the land-tax by the plaintiff beyond his own proportion; it would fall within the equity of the 124th section (*e*), and the plaintiff would be entitled to the remedies of a landlord on a lease.

(*a*) *Suprà*, 405.
(*b*) Ibid.
(*c*) *Suprà*, 405 n.
(*d*) *Sed vide suprà*, 406.

(*a*) Which enacts "that the respective purchasers of such land-tax, and their heirs, successors, and assigns, shall, from such pe-

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Third point: Whether proper defendant.

The next question is, whether the action is brought against the proper defendant. This is a point not made in the argument; it appears to me that the action ought to be brought against the person in *possession* of the land. At common law a party may recover upon a lease setting out the special circumstances of the reservation. So here, the plaintiff might have made his statement according to the special circumstances of the case. *Jefferson* was not liable to pay as *lessee*, but as *occupier* of the land. [*Bayley*, J. The defendant is in possession.] If so, that objection fails.

First point.

PARKE, J.—The first question is, what was the relative situation of the parties at the time of the redemption of this land-tax. The act then and still in force, 38 *Geo.* 3, c. 5, s. 4, directs that certain sums shall be raised amounting together to a fixed sum, and that towards the raising that sum, all manors, lands, and annuities, yearly profits, and other real property, and all persons having and holding the same, shall, in respect thereof, be charged, with as much equality and indifference as possible, by a pound-rate. The 17th section authorizes a distress, and directs that the tenants of houses, lands, &c. rated shall pay such sums as shall be rated, and shall deduct out of the rent so much of the said rate as, in respect of the said rents of any such houses, lands, &c. the landlord should and ought to pay and bear, but there is no provision that the whole shall be deducted. Looking at these clauses, the object of the legislature seems to have been that each party should pay *according to his interest*. Whether a lessee is to be considered as a pro-

riod of exoneration, be entitled to demand, have, and receive, for their, his, or her own use for ever, and shall, by virtue of this act, be adjudged, deemed, and taken to be in the actual seisin and possession of a yearly rent or sum as a fee-farm rent, equal in amount to the land-tax so purchased by him, her, or them, free of all charges and deductions whatever, to be issuing and payable out of the manors, messuages, lands, tenements, or hereditaments, whereon the land-tax so purchased was charged, on the same days as such land-tax was payable at the time of the purchase thereof."

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prietor subject to the payment of rent under section 5 (*a*), or as a tenant under section 17 (*b*), all that the lessor is ultimately to pay is such a proportion as the rent received by him bears to the entire annual value of the premises. It is immaterial for what reason he ceased to have a title to a certain portion of rent. But it could not be contended that he continued to be chargeable with the whole of the land-tax. Supposing that the lessor *assigns* part of the rent to a stranger, it can make no difference whether he assigns the rent to a stranger or discharges the tenant. Nor can it be material for what consideration he gives up the rent, whether money is paid down, or money is to be expended in improvements. None of the cases cited appear to be in point, except that from *Starkie* (*c*). The dicta in *Hyde* v. *Hill* (*d*) are in favour of this construction of the act, and it is most reasonable that the lessor should pay such proportion only of the tax as the rent which he receives bears to the total annual value. The amount of the annual value is in this case conclusively fixed by the form of the declaration.

Second point: Effect of redemption.

II. What was the effect of the redemption of the tax by the plaintiff? The act of 42 *Geo.* 3, c. 116, is complicated, and not clear, but the plaintiff is clearly entitled either as a reversioner or as a stranger. The 123d section (*e*) admits of this construction, in my judgment, and was, I think, intended to meet this case. No power is given to the person who is seised in fee, because upon the redemption of the land-tax he only exonerates himself. To a certain extent the plaintiff here exonerates himself; as to the other part he exonerates the defendant. He has a right, therefore, to have, as against the defendant, a rent-charge equal in amount to the lessee's proportion of the land-tax redeemed. The defendant must be considered to

(*a*) *Suprà*, 408.
(*b*) Ibid.
(*c*) *Whitfield* v. *Brandwood*, *suprà*, 405.
(*d*) 3 T. R. 377.
(*e*) *Suprà*, 405 n.

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be in possession, he being the lessee, and no other person being stated to be in possession.

Postea to the plaintiff (a).

(a) And see *Bradbury* v. *Wright*, 2 Dougl. 624; *Stubbs* v. *Parsons*, 3 Barn. & Ald. 516; *Watson* v. *Atkins*, ibid. 647; *Spragg* v. *Hammond*, 2 Brod. & Bingh. 59, and 4 B. Moore, 431; *Dawson* v. *Linton*, 5 Barn. & Ald. 521, and 1 Dowl. & Ryl. 117; *Sparkes, Ex parte*, Maclel. 518; *Bennett* v. *Womack*, *ante*, i. 644, 7 Barn. & Cress. 627, and 3 Car. & Payne, 96; *Warner* v. *Potchett*, 3 Barn. & Adol. 921; *Amfield* v. *White*, Ryan & Mood. 246.

See also *Rex* v. *Mitcham*, 1 Dougl. 226 n., and Caldecott, 276; *In re St. Lawrence, Winton*, Cald. 379; *Rex* v. *Folkestone*, 3 T. R. 505; *Doe* d. *Stansbury* v. *Arkwright*, 1 Nev. & Mann. 731.

The KING *v.* THOMAS SOUTHWOOD, Esq. Lord of the Manor of Taunton-Deane (*b*).

A. and *B.*, joint tenants of a copyhold, make partition by parol without the assent of the lord, and afterwards occupy in severalty.—*A.* surrenders to *C.* by general words.—*C.* is not entitled to be admitted to the parcels occupied by *A.* in severalty.

A Customary estate (*c*), parcel of the manor of Taunton-Deane (*d*), in the county of Somerset, was surrendered to the use of *Richard Staple* and *Thomas Valentine Staple*, their heirs and assigns for ever, according to the custom of the manor. *Richard Staple* paid more than one half of the purchase-money. This estate was purchased by the *Staples* in pursuance of a parol agreement between them, that *Thomas V. Staple* should have such part as was situated on one side of the river (which intersected the estate,) and lay contiguous to his own lands, *Richard*

(*b*) This case was argued in Trinity term, 1827.

(*c*) The property was described in the affidavits on which the rule was obtained as a *customary freehold*; but it was admitted that this estate, even if properly so designated, belonged to that class of customary freeholds which are within and parcel of the manor, and of which the *freehold* is in the lord. See the distinction between this species of tenure and freehold in ancient demesne, Manning's Exch. Pract. 2d ed. 359, 360, 361.

(*d*) As to the peculiar tenures in this manor, *vide ibid.* 364 n. (*r*).

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Staple taking the other part of the estate, which was more than one half thereof, and which lay contiguous to his own lands. The respective parts were accordingly entered upon, and occupied and enjoyed in severalty. *Richard Staple* occupied his part of the estate until his death, and exercised acts of ownership on the same as the sole proprietor thereof. The rates and taxes were divided between the purchasers according to the parts of the estate which they so respectively occupied and enjoyed.

In this state of things *Richard Staple* made a dormant surrender(*a*) of all his messuages, &c. within the manor, to the use and behoof of *Lee*, his heirs and assigns for ever, according to the custom of the said manor; to be holden upon condition that *Lee*, his heirs or assigns, should pay all bequests contained in the last will and testament of the said *Richard Staple*, which on the part and behalf of *Lee*, his heirs or assigns, out of, for, or in respect of the premises therein mentioned, were to be paid, performed, fulfilled, and executed; and upon a further condition that if *Richard Staple* should happen to die before Lady-day, 1832, and should not in the meantime dispose of or surrender the premises, or revoke that surrender, then such last-mentioned surrender was to be and remain in full force and virtue. After the dormant surrender, *Richard Staple* made his will, and thereby gave all his messuages and parcels of the manor, &c. to certain trustees, their heirs, &c. upon certain trusts therein mentioned.

(*a*) A *dormant* surrender in this manor, is a surrender made "for the purpose of settling his land upon any person or persons whom the surrenderor intends to make his heir or heirs, or, to charge the same with any sum or sums of money, or, for the performance of his last will and testament—such surrenders to be published and take effect after the death of the surrenderor, he leaving in himself the present possession and interest of the lands so surrendered. In every of which surrenders there must be a condition inserted, by which a power is reserved to the surrenderor to revoke, frustrate, and make void the same surrender within the space of seven or eight years, according to the custom of the manor."—Ancient Customs of the Manor of Taunton-Deane, (Taunton, 1821,) 9th Custom.

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Within the time limited by the custom for "making entries" or being admitted tenant to the lord, *Lee* applied to *W. Kinglake*, gent., Clerk of the Castle of Taunton, and steward or agent of *Thomas Southwood*, esq., lord of the said manor, and requested *Kinglake* to allow him to make the usual Entries (*a*) in respect of a certain messuage, &c. which had been so occupied and enjoyed by *Richard Staple in severalty*, and also to admit him tenant to the same pursuant to such dormant surrender. *Kinglake* refusing so to do, a notice (*b*) was addressed to *Southwood* and *Kinglake*, and served on *Kinglake*, stating the surrender. *Lee* afterwards attended at the law-day court, (or court-leet (*c*),) of the manor, in order to make the usual Entry or Entries, and gave notice of his being there for that purpose; but neither *Kinglake* nor the lord, who was then present, would then or at any time since make or allow such Entries to be made, or admit *Lee* as such tenant.

Bayly obtained a rule calling upon the lord and steward to shew cause why a writ of mandamus should not issue, commanding them or one of them to admit *Lee* tenant to the said customary lands; against which,

Manning shewed cause. Copyholders cannot make partition without the licence of the lord, *Fuller* v. *Terry* (*d*); and even if copyholders could make a valid partition, to

(*a*) As to which, *vide post*.

(*b*) "I, the undersigned *Richard Lee*, the dormant surrenderee named in the dormant surrender of *Richard Staple*, late of Corfe, in the county of Somerset, yeoman, deceased, do hereby, as such dormant surrenderee, request and require you immediately to allow me to make the usual Entries in respect of the undermentioned messuage or site of a house, closes of land, and hereditaments, which belonged to and were in the possession of the said *Richard Staple* at the time of his death, and *parts* of an estate lately belonging to *John Dyer*, situated in the said parish of Corfe, and parcels of the manor of Taunton-Deane, and also *to admit me tenant* of the same, pursuant to such dormant surrender. [Here follow the parcels.] Dated the 23d April, 1827.

(Signed) *Richard Lee*."

(*c*) *Vide ante*, 143 n.

(*d*) Hargr. Co. Litt. 59 a, note 395.

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endure whilst the existing grant continued, it would be unreasonable to require the lord to make re-grants in severalty, as the lord would thereby lessen his remedy for his rent. At present every part of the copyhold is liable for the whole rent; whereas after a severance assented to by the lord, he could distrain only pro particulâ illâ. Besides which, if this mandamus were to issue, by whom is the rent to be apportioned between *Lee* and the surviving brother? It is not disputed that the effect of the dormant surrender was to sever the joint-tenancy, and create a tenancy in common; and the lord has always been ready to admit *Lee* to an undivided moiety of the whole tenement. The notice confounds the *legal* severance of the *joint-tenancy* by the dormant surrender, and the *actual* severance of the *parcels* by an occupation in severalty of distinct parts of the customary lands.

Bayly, in support of his rule, cited *Snag* v. *Fox* (*a*), in which a copyholder aliened part of his copyhold to one and part to another, and retained part in his own hands, and no question was made as to the right of the copyholder so to deal with his estate; and the only doubt was, whether the lord was entitled to more than one heriot (*b*). [*Bayley*, J. There the lord assented to the alienation.] He also referred to *Wase* v. *Pretty* (*c*).

Lord TENTERDEN, C. J.—Two persons are joint tenants of the copyhold. They occupy in severalty, but their *estate* is joint. One of the joint-tenants surrenders to the lord by words capable of passing the whole. That

(*a*) Palm. 342; S.C. 2 Roll. Abr. 514; 20 Vin. Abr. 243.

(*b*) Where the lord has become entitled to several heriots by the severance of a heriotable tenement, and the different parts of the severed tenement are afterwards re-united in the same tenant, the lord is only entitled to one heriot; *Holloway* v. *Berkeley*, 9 Dowl. & Ryl. 83, and 6 Barn. & Cress. 2; unless *during the severance* the lord has, by perception of the several heriots from the respective tenants, obtained actual *seisin* of such new heriots. Manning's Exch. Prac. 2d ed. 341.

(*c*) Winch, Rep. 3; Hetley, 150.

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severs the joint-tenancy. The surrender can only operate upon that which the party has, and can pass.

BAYLEY and HOLROYD, Js., concurred.

LITTLEDALE, J.—The only course which *Lee* can adopt seems to be to procure the surviving tenant in common to join in a surrender of the whole, and then to apply to the lord to grant out the parcels in severalty.

Rule discharged.

Manning applied for the costs of the motion, which the Court refused, on the ground that it did not appear by affidavit, that when *Lee* applied to be admitted in severalty any offer was made to admit him to an undivided moiety.

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A. at Sydney, ships goods to *B.*, at London, by the ship *C.*, and by the next ship writes to him, directing him, if the letter arrives before the *C.*, to wait thirty days, in order to give every chance for her arrival, and then to insure the goods. *B.* receives the letter, and after waiting thirty-six days, insures the goods, telling the underwriter when the *C.* sailed and where the letter was written, but not telling him when he received the letter. The *C.* never arrives. This is a material concealment, and avoids the policy.

In an action on the policy, under such circumstances, the *opinion* of underwriters as to the materiality of the matter concealed, was held to be admissible evidence (*a*).

THIS was an action of covenant, upon a policy of insurance on goods by the ship *Cumberland*, at and from Sydney to London, effected by the plaintiff as agent for one *Campbell*, and for his benefit, with the Mutual Marine Insurance Company, of which the defendants were directors. The claim was for a total loss by perils of the seas. There were several special pleas, but the questions in the cause arose upon two only, the fifth and the seventh. The fifth plea stated, that before the making of the policy, to wit, on the 28th May, 1827, *Campbell* sent from Sydney to one

(*a*) Contrà *Campbell* v. *Rickards*, 2 Nev. & Mann. 542.

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Harris at London a letter, containing the order for effecting the policy, by another ship called the *Australia*, which had sailed from Sydney a long time, to wit, more than a month after the *Cumberland* had sailed from thence on her voyage mentioned in the policy; that *Campbell* thereby instructed *Harris* to deliver the said letter to one *Emmett*, who had before then sailed from Sydney to London on board the *Cumberland*, in case *Emmett* should have arrived in England when *Harris* should receive the said letter; but if *Emmett* should not have then arrived, *Campbell* thereby instructed *Harris* to retain the said letter in his possession for the space of thirty days after he should receive it, and at the expiration of that time to deliver the same to the plaintiff, he, *Campbell*, having in the said letter intimated that he had directed *Harris* not to deliver the same to the plaintiff, until the expiration of thirty days after the arrival of the *Australia* in London, in order to give every chance for *Emmett's* arrival in England before the said letter should be delivered to the plaintiff, (he, *Campbell*, thereby meaning, that unless *Emmett* did arrive in England before the expiration of thirty days after the arrival of the *Australia* in London, he, *Campbell*, had little hope that the *Cumberland* would arrive in safety at London with *Emmett* on board;) that the said letter was dated at Sydney on the 28th May, 1827, and stated that the *Cumberland* sailed on her voyage on the 25th April, 1827; that before the making of the policy, to wit, on the 8th October, 1827, the *Australia* did arrive at London from Sydney with the said letter, and that *Harris* did receive and detain the said letter in his possession for thirty days and more after the receipt thereof, and at the expiration of that time did deliver the same to the plaintiff, who thereupon caused the policy to be effected; that the plaintiff *did not disclose*, nor was it disclosed to the defendants or the said company, before or at the time of making the policy, that the said letter came by the *Australia*, or that the *Australia* had sailed from Sydney so long or at all after the *Cumberland*, or that *Campbell* had so requested

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the said letter containing the said order to be so detained by *Harris*, or that the same had been so detained by him, or that *Campbell* had so intimated in his said letter the purpose for which he so directed the said letter to be so detained by *Harris*, or that *Campbell* had so intimated that he had little hope of the safe arrival of the *Cumberland* at London with *Emmett* on board, in case she did not arrive within the space of thirty days of the arrival there of the *Australia*; that the several matters and things *so concealed* from the defendants and the said company at the time of making the policy, and not disclosed, materially affected and increased the risks, touching which the funds of the said company were by the policy intended to be made liable; and which matters and things, if the same had been disclosed, would have materially affected and increased the premium or consideration for the said insurance. The seventh plea stated, that the plaintiff, before and at the time of making the policy, concealed from the defendants and the said company divers facts and matters which, at the time of making the policy, materially affected and increased the risks, touching which the funds of the said company were intended to be made liable, and were thereby made liable; and which facts and matters, if disclosed, would have materially affected and increased the premium or consideration for the said insurances. Replication: to the fifth plea, de injuriâ suâ, &c.: to the seventh, that the plaintiff did not, before or at the time of making the policy, conceal from the defendants and the said company any facts or matters which, at the time of making the policy, materially affected or increased the said risks; or which, if disclosed, would have materially affected or increased the premium or consideration for the said insurance. At the trial before Lord *Tenterden*, C. J. at the London adjourned sittings after Hilary term, 1829 (*a*), the following facts appeared:—

Mr. *Robert Campbell* was a merchant at Sydney, and the person interested in the policy in question. He had been

(*a*) *Vide* 1 Dans. & Lloyd, 221, and 1 Ll. & W. 132.

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for some years a correspondent of the firm of *Rickards, Mackintosh*, & Co., in which the plaintiff was a partner. In April, 1827, he shipped on board the *Cumberland*, then about to sail from Sydney for London, viâ Hobart-Town, a large quantity of seal skins, (the goods insured by the policy in question,) under the care of a Mr. *Emmett*, who was going as a passenger in that vessel.

The *Cumberland*, with *Emmett* and the skins on board, sailed from Sydney on the 27th of April, 1827, and upon hearing of her safe arrival at Hobart-Town, *Campbell* wrote and forwarded the following letter:—

"Sydney, New-South-Wales, 28th May, 1827.

"In case of the non-arrival of Mr. *Emmett* per ship *Cumberland*, you will herewith receive the seconds of ten sets of treasury bills, amounting to 3000*l.*, and the second of exchange, *Elizabeth von Bibra* on *Henry Powell*, for 80*l.*, making 3080*l.*; which amount I will thank you to invest agreeably to the accompanying instructions.

"I will also thank you to effect insurances, at market price, on forty-nine casks, containing 4175 New-Zealand fur seal skins, shipped to the consignment of Mr. *Emmett* per *Cumberland*, or, in case of death, to your house; for which purpose I inclose you the bill of lading. The *Cumberland* left Port-Jackson for London, viâ Hobart-Town, on the 25th of April, 1827, and by letters received from Mr. *Emmett*, was at Hobart-Town on the 10th of May, 1827, and was expected to sail from thence in ten or fourteen days from that date.

"Insurance to be effected on the goods shipped to my consignment, and the freight payable in New-South-Wales. I wish the goods to be shipped by two or three opportunities, and, if practicable, by vessels coming direct to Sydney.

"To give every chance to Mr. *Emmett*'s arrival in England, I have directed my friend Mr. *Harris* not to deliver this until thirty days after the arrival of the *Australia* in London; and should Mr. *Emmett* arrive after you have

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fulfilled these instructions, you will communicate to him what you have done, it having been mutually agreed upon, previously to his leaving New-South-Wales, that in case of any accident to him you should be appointed agent of this concern."

This letter was inclosed in an envelope, which bore the following address:—

"This letter is to be delivered by Mr. *Harris* to Mr. *Emmett*, if he has arrived, and if not, to be retained in Mr. *Harris*'s possession thirty days from the date he receives it, and then to be delivered to Messrs. *Rickards, Mackintosh*, & Co., London."

This letter was forwarded by the ship *Australia*, which sailed from Sydney on the 2d of June, 1827, and arrived in London on the 6th of October, 1827, and was delivered in London on the 8th of October, 1827, to Mr. *Harris*, who retained it in his possession thirty-six days; at the end of which time, namely, on the 13th of November, 1827, no news having been received either of the ship *Cumberland* or of Mr. *Emmett*, he, *Harris*, handed over the letter to Messrs. *Rickards, Mackintosh*, & Co.

Messrs. *Rickards, Mackintosh*, & Co., on the same day that they received the letter, delivered it to their clerk, Mr. *Towers*, for the purpose of his effecting the insurance therein ordered. *Towers* first went to *Lloyd*'s, where he was asked a premium of 70*s*. per cent. He then went to the office of the Mutual Marine Insurance Company, where he saw the managing clerk, a Mr. *Ellis*, to whom he read the second paragraph of the letter, and no more; but he stated the date of the letter and the place from whence it was written; and no further particulars being inquired into by Mr. *Ellis*, *Towers* and he agreed upon a premium of 60*s*. per cent., and the policy was effected on those terms. The *Cumberland* was never afterwards heard of, and was presumed to have foundered at sea. Two vessels that had sailed from Sydney after the *Australia*, arrived in England two or three days before the policy was effected, and their

arrival was announced in *Lloyd*'s list on the morning of the day when the policy was effected. Several underwriters, who were called as witnesses on the part of the defendants, stated, that in their opinion the whole of the letter ought to have been read to Mr. *Ellis*, and that the part omitted was material. This evidence was objected to, but was admitted by the Lord Chief Justice, who left the question of materiality to the jury. The same witnesses stated upon cross-examination, that if one underwriter refuses a risk, that circumstance is never communicated by the broker to any other underwriter to whom the risk is afterwards offered. The jury having found a verdict for the defendants,

Scarlett, A. G., in Easter term, 1829, obtained a rule nisi for a new trial, on two grounds; first, that evidence of the opinion of the underwriters ought not to have been admitted; and, secondly, that the part of the letter which had not been read could not properly be deemed material, inasmuch as it did not relate to any facts, but only to the apprehensions of the writer, and that the party effecting an insurance was not bound to communicate any thing but facts, unless questioned by the underwriter: *Haywood* (or *Hayward*) v. *Rodgers* (*a*), and *Freeland* v. *Glover* (*b*).

F. Pollock and *Tomlinson* shewed cause. First, evidence of the opinion of the underwriters was properly admitted in this case, for the purpose of shewing that the matter withheld from the insurers was material, and ought to have been communicated. It was decided in *Lindenau* v. *Desborough* (*c*), that it is the duty of a party effecting an insurance on life or property, to communicate to the underwriter all the material facts within his knowledge, touching

(*a*) 4 East, 590; 1 Smith, 289.

(*b*) 7 East, 457; 3 Smith, 424; 6 Esp. N. P. C. 14. And see *Court* v. *Martineau*, 3 Dougl. 161.

(*c*) 8 Barn. & Cress. 586; *ante*, vol. iii, 45. And see the note *ante* iii, 47 (*a*), in which are cited *Maynard* v. *Rhodes*, 5 Dowl. & Ryl. 266, and *Everett* v. *Desborough*, 5 Bingh. 503, 4 Moore & P. 190.

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the subject-matter of the insurance, whether *he* believes such facts to be material, or not; and that it is a question for the jury whether any particular fact was or was not material. Upon that question the judgment of the jury must be aided and guided by evidence; and the opinion of persons conversant with the subject-matter of the inquiry, is efficient and proper evidence for that purpose. In *Berthon* v. *Loughman* (*a*), where the defence was, that material information, as to the time when a ship sailed, had been withheld from the underwriter, *Holroyd*, J. held that a witness, conversant with the subject of insurance, might give his opinion, as a matter of judgment, whether particular facts, if disclosed, would have made a difference in the amount of the premium. In *Durrell* v. *Bederley* (*b*), *Gibbs*, C. J. said (*c*), "It is the province of the jury, not of individual underwriters, to decide what facts ought to be communicated," and he received the evidence of underwriters with hesitation; but the question there asked was,—not whether the matter in dispute was material,—but whether the witnesses would have accepted the risk.

Secondly, the part of the letter not read was material, and ought, therefore, to have been communicated. *Hayward* v. *Rogers* (*d*), and *Freeland* v. *Glover* (*e*),—the cases cited when this rule was obtained,—are very different from the present case. In the former of those it was held, that a letter stating that the ship insured had been surveyed on account of her bad character, need not be communicated; but the ground of that decision was, that the assured always impliedly warrants the ship insured to be seaworthy. In the latter, two letters had been received by the assured respecting the state of the ship, and the second only was communicated to the underwriter; but as that expressly referred to the first, so that the underwriter knew that further information had been received, and might have

(*a*) 2 Stark. N. P. C. 258.
(*b*) Holt, N. P. C. 283.
(*c*) Ibid. 286.
(*d*) 4 East, 590; 1 Smith, 289.
(*e*) 7 East, 457; 3 Smith, 424; 6 Esp. N. P. C. 14.

called for it, it was held that his omitting to do so was an answer to the objection. In the present case the insurer had no means of knowing that the plaintiff had received any information respecting the *Cumberland* beyond that which was read to him; nor could he know that the letter was not brought by one of the two vessels which arrived immediately before the policy was effected: but the plaintiff was aware of both those facts, and therefore the whole of the letter ought to have been read, and the fact that the letter came by a vessel which sailed after the *Cumberland*, and arrived a month before the policy was effected, ought to have been distinctly communicated. In *Kirby* v. *Smith* (*a*), where a ship had sailed from Elsineur, on her voyage home, six hours before the owner, who followed in another vessel on the same day, and who, having met with rough weather in his passage, arrived first, and then caused an insurance to be effected on his own ship, it was held, that these circumstances were material to be communicated to the underwriter, and that it was not sufficient to state merely that the ship insured was "all well at Elsineur on the 26th of July," the day of her sailing. In *Willes* v. *Glover* (*b*), the plaintiff, the consignee of goods, received a letter from the consignor, dated 30th November, stating, "I think the captain will sail to-morrow; but should he not be arrived in your port, you will be so good as to make the insurance as low as you possibly can for my account:"—This letter arrived on the 12th December, and on the following day the plaintiff effected the insurance, without communicating the letter; and it was held that this was a material concealment. In *M'Andrew* v. *Bell* (*c*) the insurance was on a ship from Lisbon to London:—On the 24th of November the plaintiff in London received a letter from Lisbon, dated the 8th, informing him that the ship would sail on that day:—On the 2d of December, and after the arrival of another ship which sailed at the same time, the plaintiff effected the in-

(*a*) 1 Barn. & Alders. 672. (*b*) 1 N. R. 14. (*c*) 1 Esp. N. P. C. 373.

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surance, but without communicating to the underwriter the letter that he had received. Lord *Kenyon* held that this was a material concealment, and observed, that "it appeared that the plaintiff did not intend to insure until he believed her to be a missing ship,—as he did not effect the policy for ten days after the letter arrived, and not until another ship which had sailed at the same time with his own had arrived in safety." That case is not, in substance or in principle, distinguishable from the present; for it is clear that *Campbell* did not intend to have the insurance upon the *Cumberland* effected, until, in his opinion, all hope of her safe arrival would have ceased.

Scarlett, A. G., *Campbell*, and *Maule*, contrà. All the *facts* which it was necessary for the fair protection of the underwriter that he should know, were communicated to him at the time when this policy was effected; it was not necessary that he should be informed of mere matters of *opinion*. It is not pretended that any *fraud* was practised; and therefore the case last cited has no bearing upon the present. It is not even pretended that the *Cumberland* was *in fact* a missing ship when she was underwritten, but only that *Campbell* the owner must have *thought* her to be so, and that his *opinion* on that point ought to have been communicated to the underwriters. There is no authority for that argument. The underwriter is always presumed to know the general nature and ordinary duration of the voyage for which he insures; and he is entitled to be informed, where the means of such information exist, of the time when the ship sailed, or was expected to sail, and of all other *facts* which would in any degree vary the general character of the risk. Beyond this the assured is not bound to volunteer information, and if the underwriter wishes for further information, it is his duty to ask for it. This distinction is strongly pointed out by Lord *Ellenborough* in *Haywood* v. *Rodgers*(*a*). The defendants in

(*a*) 4 East, 590; *Hayward* v. *Rodgers*, 1 Smith, 289.

this case had as good means of forming an opinion as to the probability of the safe arrival of the *Cumberland*, as the owner had; and the opinion either of the one or the other could not by possibility vary the real nature of the risk. It seems admitted that if the letter had arrived only a day or two before the policy was effected, it would not have been necessary to mention it. The material fact upon which the calculation of the underwriter always depends, is the date of the ship's sailing; and that was truly communicated in the present case. The argument on the other side must go this length—that a party about to insure is bound to communicate to the underwriter all the fears which he himself entertains. Suppose *Campbell* himself had been in England; had received information of the *Cumberland* having sailed from Sydney on a particular day; had neglected to insure her for thirty days; had then become alarmed, and employed an agent to effect an insurance, stating to him the alarm he felt—would the agent have been bound to state that circumstance to the underwriter? If so, a policy may be good or bad according to the strength or weakness of the nerves of the ship-owner, or according to his habit of expressing or concealing the anxiety or alarm he feels about the safety of his property. The opinion of an underwriter as to the probable safety of a ship upon a particular voyage, must be at least as important as that of the owner; and yet it was in evidence in this cause, that where one underwriter refuses a risk, that circumstance is never mentioned to any other underwriter to whom the same risk is afterwards offered. In *Bell* v. *Bell* (*a*), the assured upon a policy from Riga to London had received a letter from their correspondents at Riga, stating that the papers of all vessels arriving in that port had been ordered to be sent to Petersburgh, and that the order had produced a great sensation, on account of the detention occasioned by it, and expressing considerable apprehension for the safety of the ship. This letter was

(*a*) 2 Campb. 479. And see 3 Dougl. 41.

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not shewn to the underwriter when the policy was effected, but he was informed by the broker that the ship's papers had been sent to Petersburgh. It was contended that this was a material concealment, which rendered the policy void, but Lord *Ellenborough* ruled otherwise, and said, "The assured are only bound to communicate *facts*. The broker did communicate the fact of the ship's papers being sent to Petersburgh for examination. He was not bound to communicate the sensations and apprehensions which that fact produced at Riga;" and this ruling was afterwards supported by the whole Court. *Carter* v. *Boehm* (*a*) had previously decided that the apprehensions or opinions of a party insuring need not be stated, and that case is also a strong authority to shew that the opinions of the underwriters upon the materiality of the matter not communicated, ought not to have been received in evidence in this case. There, the broker who effected the insurance was allowed to state at the trial that, "in his opinion certain letters ought to have been shewn, or their contents disclosed, and that if they had, the policy would not have been underwritten (*b*):"—After argument upon a motion for a new trial, Lord *Mansfield*, referring to this evidence, said (*c*), "We all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion *after* an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Courts and jury were to determine the cause, and therefore it is improper and irrelevant in the mouth of a witness." And the judgment of *Gibbs*, C. J., in *Durrell* v. *Bederley* (*d*), is to the same effect. He there said, "I am of opinion that the evidence of the underwriters, who were called to give their opinion of the materiality of the rumours, and of the effect they would have had upon the premium, is not admissible

(*a*) 3 Burr. 1905.
(*b*) Ibid. 1914.
(*c*) Ibid. 1918.
(*d*) Holt, N. P. C. 283.

evidence. It is the province of the jury, not of individual underwriters, to decide what facts ought to be communicated. It is not a question of science, on which scientific men will mostly think alike, but a question of opinion liable to be governed by fancy, and in which the diversity might be endless. Such evidence leads to nothing satisfactory, and ought on that ground to be rejected." *Lindenau* v. *Desborough* (*a*) cannot be regarded as a conflicting authority; for there the opinions given *did* relate to a question of science.

Cur. adv. vult.

Judgment was now delivered by

Lord TENTERDEN, C. J.—This was an action on a policy of insurance on goods by the ship *Cumberland*, at and from Sydney to London. A verdict having been found for the defendants, a rule nisi for a new trial was granted; and on the argument, the main question was, whether a certain letter, which had been received by the plaintiff, was material and ought to have been communicated to the defendants. One part of it, stating the time when the *Cumberland* sailed from Sydney, and when she was expected to sail from Hobart-Town, was stated, but the residue was not. The part which was not stated contained this expression:—"To give every chance for Mr. *Emmett*'s arrival in England, I have directed my friend, Mr. *Harris*, not to deliver this until thirty days after the arrival of the *Australia* in London." The *Australia* did arrive, the thirty days elapsed, and Mr. *Emmett*, who was on board the *Cumberland*, did not arrive; and in the meantime two other vessels that sailed from Sydney after the *Australia*, had arrived. The question was, whether this part of the letter was material, as altering the risk and the premium that the assured would have to pay. It was contended, for the plaintiff, that this fact of the letter having arrived so long before the insurance was effected,

(*a*) 8 B. & C. 586; 3 M. & R. 45.

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was not of such a nature as that, if it had been communicated, it would have affected the risk; that, at all events, it would only go to affect the amount of the premium. But, in our opinion, nothing can affect the amount of the premium, without also affecting the risk. That was the way in which the point was put in *Lynch* v. *Hamilton* (*a*), where *Mansfield*, C. J., said, "A person insuring is bound to communicate every intelligence he has, that may affect the mind of the underwriter in two ways—first, as to the point whether he will insure at all; and secondly, as to the point at what premium he will insure." At the trial of this cause some witnesses stated that they thought that the letter was material and ought to have been communicated. It has been contended that no such evidence ought to have been received. I know not how the materiality of any matter is to be ascertained but by the evidence of persons conversant with the subject-matter of the inquiry. If such evidence is rejected, the Court and jury must decide the point according to their own judgment, unassisted by that of others. If they are to decide, all the Court agree in thinking that the letter was material and ought to have been communicated, and that a jury would have been bound to come to that conclusion. The case is somewhat peculiar. The ship was at Hobart-Town. The owner, who was a resident at Sydney, and who must be taken to have known the character of the ship, wrote to his agent here by another vessel sailing from that place at about the same time that the *Cumberland* was expected to sail from Hobart-Town, and directed him, after the receipt of the letter, to give his ship every chance of arriving before he effected the insurance. If the fact that the letter had been so long received and detained by his direction before the insurance was effected, had been made

(*a*) 3 Taunt. 37, where it was held, that it "is the duty of the assured not only to communicate to the underwriter articles of intelligence which may affect his choice, whether he will insure at all, and at what premium he will insure, but likewise all rumours and reports which may tend to enhance the magnitude of the risk."

known to the underwriter, it would in all probability have had some influence on his mind, and would have induced him, as was said in *Lynch* v. *Hamilton* (*a*), either not to underwrite at all, or not to underwrite except upon an increased premium. There was another fact also not immaterial—two ships had arrived from Sydney within two or three days before the insurance was made, and the underwriter might naturally suppose that the letter had come by one of them; he should therefore have been informed of the true time at which it had been received.

For these reasons we are of opinion that the verdict found for the defendants was right, and that this rule for a new trial ought to be discharged.

Rule discharged (*b*).

(*a*) 3 Taunt. 37. (*b*) *Vide* Selw. N. P. 985, 7th ed.

HARRISON, Executor of HARRISON, *v.* DOWBIGGIN, Administratrix, cum testamento annexo, of DOWBIGGIN.

A suit abates by the death of either party between a *nonsuit* and judgment, notwithstanding 17 *Car.* 2, c. 8.

So, if the death occur between *verdict* and judgment, unless judgment be actually signed within two terms after verdict.

SCIRE facias on a judgment of nonsuit in an action in which the now defendant was plaintiff, and *Harrison*, the testator, was defendant. The nonsuit took place 15th December, 1827. Before Hilary term, viz. 5th January, 1828, the testator died. In the following October an application was made in the name of the testator by his executor (the now plaintiff) to tax the testator's costs, which the master refused to do. This Court granted a rule nisi for directing the master to tax the costs, which after argument (in the course of which no allusion was made on either side to the circumstance of the testator's having died), was made absolute (*c*). The costs having been taxed and the master's allocatur given, judgment was, on the 11th November, 1829, signed in the name of the testator; a scire facias and an alias sci. fa. were sued out calling upon the defend-

(*c*) *Ante*, vol. iv. 622, and 9 Barn. & Cress. 666.

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ant to shew cause why the plaintiff, as executor of *Harrison*, should not have execution upon the judgment.

Godson, in this term, obtained a rule to shew cause why the writs of sci. fa. should not be set aside. The motion was made on the ground of irregularity, the alleged irregularity being that the action had abated by the death of the testator, it being submitted that the statute of 17 *Car.* 2, c. 8, which authorizes the entering up of judgment within two terms after verdict, does not apply to a case in which the plaintiff has been *nonsuited*, or to any case in which *three* entire terms have been suffered to elapse before the signing of the judgment.

Campbell now shewed cause. The Court will not favour the defendant's application, for she is now setting up a new objection, after having been already before the Court since the death of the testator, to take her chance of success upon another question. At common law no doubt all suits abated by the death of either party before judgment, but by 17 *Car.* 2, c. 8, it is enacted, that in all actions the death of either party, between the verdict and the judgment, shall not be alleged for error. Although this *in its very words* applies only to cases in which a *verdict* has been given, yet the mischief which the statute was intended to remedy is the same in the case of a *nonsuit*. Even if it be doubtful whether this construction is correct, the Court will not give the defendant a summary relief, but will leave her to *plead* to the scire facias, or to bring a writ of error (*a*).

Godson, contrà. It is now usual for the Court to relieve a party in such a case as this upon motion. The Court

(*a*) So, although the Court will interfere upon motion where a party is *clearly* entitled to a writ of auditâ querelâ, yet if the right to the relief be *doubtful*, either upon the facts or upon the law,—the Court will leave the party to his remedy by auditâ querelâ. *Symons* v. *Blake*, 2 Crompt. Mees. & Rosc.

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will interfere in a summary way instead of putting parties to the expense of a writ of error, or of pleading to the sci. fa. With respect to what is said in allusion to the plaintiff's having already been before the Court, the answer is, that the defendant's representative is not injured by the discussion of the question respecting the plaintiff's liability to pay costs. Supposing that instead of a *nonsuit* there had been a *verdict* in this case, the right of the defendant to avail himself of the provisions of 17 *Car.* 2, c. 8, would have been lost before that discussion took place, by reason of his having omitted to enter up judgment within two terms; *Copley* v. *Day*(*a*). But the statute of *Car.* 2, clearly does not apply to cases where the action has been terminated by a nonsuit.

Lord TENTERDEN, C. J.—If the case of a nonsuit were within the statute of 17 *Car.* 2, c. 8, the judgment must be signed within two terms. The words of the statute are, "So as such judgment be entered within two terms after such verdict." This must mean that no greater time is to intervene between the verdict and the time when judgment is actually signed. But as a *nonsuit* is not mentioned in the statute, the case of a nonsuit is left as at common law.

Rule absolute.

(*a*) 4 Taunt. 702.

BRETT *v.* BEALES and others.

Liability to repair *part* of the streets of a town, is not a sufficient consideration for toll-thorough extending over the *whole* town.

ASSUMPSIT for tolls. Plea: non assumpsit. At the trial(*b*) before Lord *Tenterden*, C. J., at the sittings at Westminster after last Michaelmas term, the following facts appeared: The plaintiff is lessee of the tolls in question under the mayor and burgesses of Cambridge, who have immemorially repaired all the quays and bridges and

(*b*) The trial occupied three days.

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one of the streets of the town. The modern perception of the tolls was proved, and it was shewn by Domesday-Book that *consuetudines* (*a*) were paid to the king, to whom the town then belonged. From the Pipe-rolls of 31 *Hen.* 2, (1184,) and 1 *Johann.* (1199,) it appeared that the burgesses had held the town at farm, and by a charter 8 *Johann.* the town, *with the appurtenances*, was granted to the burgesses and their heirs, habendum of the king and his heirs (*b*).

A composition deed, temp. *H.* 8, between the Corporation of Cambridge and the University, reciting and confirming an award made between the same parties, one of the provisions of which fixed the rate of the tolls to be taken by the corporation, was admitted as evidence of reputation as to the existence of the tolls, though the modern payments had not been made in perfect conformity with the deed.

A table of tolls in the possession of the corporation, from which copies had been delivered out to officers who had collected under such copies, was received in evidence.

The plaintiff also tendered in evidence an old book produced from the muniments of the mayor and burgesses, called the "Common Day Book," containing entries of the proceedings of the corporation. From this book the plaintiff had proposed to read orders made by the corporation directing the collection of tolls (*c*). This evidence was

(*a*) As to this term, *vide* Mad. Exch. 525; F. N. B. 151; *ante* iii, 340 n; Ducange, *Glossar.* in verbo.

(*b*) The effect of this grant (independently of the question as to the tolls,) was to pass from the king to the corporate body the *seisin* of the lands and hereditaments which the king or lord of the borough had in demesne, and the immediate seigniory over the burgage tenures (*vide* Litt. s. 162), leaving to the king a *seigniory* in respect of that which he before had in *demesne;* and a seigniory *paramount* in respect of the property (the burgage tenures), as to which he had previously to the grant, an *immediate* seigniory.

(*c*) The following is a copy of one of the orders:—"1617, Aug. 25. It is likewise this day agreed that a letter of attorney be made to the four bailiffs, authorising them to receive all lawful tolls and customs belonging to the corporation. The same to be drawn up by the advice of the recorder and then sealed with the town seal."

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objected to on the part of the defendant, on the ground that these orders were merely private memoranda. Lord *Tenterden*, C. J., upon the authority of *Marriage* v. *Lawrence* (a), rejected the evidence.

For the defendant, it was contended that there was no evidence to support a claim for toll-traverse, and that there was no consideration to support a claim for toll-thorough, for which *Truman* v. *Walgham* (b) was cited.

The learned judge stated to the jury that the law recognizes two sorts of toll,—toll-thorough and toll-traverse; toll-thorough, where a party is entitled to take toll in consideration of a liability to repair public highways; toll-traverse, where the soil is dedicated by the owner to the public, subject to the reservation of a toll to be paid by those who pass over it; that in this case, though the plaintiff had proved that the corporation repaired *one* of the streets, he had failed to prove that all the roads and streets in Cambridge, (in respect of the passing through *any* part of which the toll is claimed,) were repaired by the corporation; that the consideration therefore was not co-extensive with the toll claimed; that he was therefore of opinion that the claim for *toll-thorough* could not be supported:—that with respect to *toll-traverse*, it appeared that at the time of the compilation of Domesday-Book (c), the town of Cambridge was part of the possessions of the crown, and that at that time there appeared to have been a town and highways at Cambridge; that as the reservation of toll-traverse must be made eo instanti with the dedication of the soil to the public, the dedication in this case must have been as early as the reign of *William* the Conqueror; that if the king was seised of toll-traverse prior to the grant of the town, "with its appurtenances," in the charter of *John* those words would be sufficient to pass the right to such toll, but that it was for the jury to say whether, from the

(a) 3 Barn. & Alders. 142. And see *Hill* v. *Manchester and Salford Waterworks*, 2 Nev. & Mann. 573.

(b) 2 Wils. 296.

(c) A.D. 1086.

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term "*consuetudines*" in the Domesday-Book, and from the modern usage, they were satisfied that such toll-traverse was reserved upon the original dedication of the soil of the highways to the public. The jury having found a verdict for the defendants,

W. E. Taunton now moved for a new trial, on the ground of the improper rejection of evidence and of misdirection, (the Court expressing a strong opinion upon the former point, he confined himself to the point of misdirection.) The repairs done by the corporation prove their title to toll-thorough. It was not necessary to shew that the repairs had extended over the whole town. *Truman* v. *Walgham* (*a*) cannot be supported. That case is at variance with former decisions. In *Rex* v. *Boston* (*b*), a toll-thorough was supported upon the consideration of repairs done to a bridge, the pavement of a street, and to a sea-bank. In *Smith* v. *Shepherd* (*c*), it was said that the maintaining of a way or a bridge was a good consideration for a toll-thorough. In *Crisp* v. *Bellwood* (*d*), the repairing of a certain wharf for the landing of merchandize was held to be sufficient consideration for toll upon merchandize landed within any part of the manor. The repairs done afforded evidence of a *general* liability to repair, which general liability would, at all events, have supported the claim.

Cur. adv. vult.

On a subsequent day the judgment of the Court was delivered by

Lord TENTERDEN, C. J.—After stating the form of the action and the evidence, his lordship proceeded thus:—Being of opinion that the decision in *Truman* v. *Walgham* was correct, and that it had been so considered, I presented the case to the jury as a question of toll-traverse, having its origin at the same time as the streets. A new

(*a*) 2 Wils. 296.
(*b*) Sir W. Jones, 162.
(*c*) Cro. Eliz. 710.
(*d*) 3 Lev. 424.

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trial was moved for, on the ground that the case ought to have been left to the jury as a case of toll-thorough. Since the case of *Truman* v. *Walgham*, the same question has arisen in *Hill* v. *Smith*(*a*). There the defendants justified under the title of the mayor, aldermen, and citizens of Worcester, for toll of goods and corn sold by sample in the market-place, and afterwards delivered within the city. In *Hill* v. *Smith*, one of the pleas stated an immemorial custom for the corporation to hold a market. One plea stated that the corporation repaired the pavement of the corn-market, and certain highways and streets, and had immemorially taken a reasonable toll for corn sold by sample. The jury found a verdict in favour of the toll for corn sold by sample. This Court refused a new trial. Some allusion was made to this claim on the part of the corporation in respect of the repairs of the pavement of the corn-market. That Lord *Ellenborough* dismisses very lightly, and says, that the objection is on the record. A writ of error being brought in the Exchequer Chamber the judgment was reversed, that Court being of opinion that the pleas were bad as to the corn sold by sample. Sir *James Mansfield*, C. J., in delivering the judgment of the Court, says, "the defendant pleads a right under the corporation of Worcester to take a toll upon what is called in the pleadings a sale by sample. The sole question is, whether the prescription is such as can be sustained in law. If claimed as toll-thorough, it cannot be supported, for it is not alleged that the corn passed over any street which was repaired by the corporation, therefore there is no pretence for calling it toll-thorough." That is precisely to this point. Mr. *Taunton* pressed the authority of *Smith* v. *Shepherd*, in which *Popham*, C. J., says, "One may have a toll-traverse by prescription, and so he may have toll-thorough, but it ought to be for some reasonable cause which must be shewn, viz. that he is to maintain a causeway, or to repair a way, or a bridge, or such like; and the

(*a*) 4 Taunt. 520.

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queen at this day may grant such toll, being but a petty thing, in respect it shall be a greater benefit or ease to the people for the repairing of a dangerous way, or the like." Mr. *Taunton* says, that the language of *Popham*, C. J., does not imply that it must be a particular way, or particular place, in respect of which the toll is claimed; but I think it must be so understood even upon that report alone; but the same case is reported in Sir *F. Moore* (*a*), where it is said, "the prescription is not good or reasonable for any to take toll for passage in viâ regiâ, and the inheritance of each man in the passage *in viis regiis* is precedent to all prescriptions; but if the party shows a cause for the toll, as if he is bound to repair the bridge or the causeway &c., there may be a reasonable cause for the commencement of the toll and prescription; but that is not shewn in the principle case; but for toll-traverse it is clear that a man may prescribe, because this is for passage over his own freehold; it is otherwise for toll-thorough, as this is in the case at bar." According to that report the right is put upon the liability to repair the particular road. In 2 *Roll. Abr.* Prerogative, E. pl. 20 (*b*), it is said that the king cannot charge his subjects by an imposition, unless it be for the benefit of the subjects who shall be charged, and where they shall have quid pro quo. A person passing along one street cannot be benefitted by the liability of the corporation to repair some other street;—such liability therefore cannot be sufficient consideration to support a claim for toll-thorough. We are not called upon to say in what cases a claim for toll-thorough can be sustained.

Rule refused.

(*a*) Page 574, No. 793.

(*b*) Translated 16 Vin. Abr. 580, citing 13 *H.* 4, 14 b, and 11 Co. Rep. 86 b, (which merely *refers* to 13 *H.* 4.) In *H.* 13 *H.* 4, fo. 14, pl. 11, *Gascoigne*, C. J., says, "If the king grant to me that I may inclose my town, and grants that I may take a halfpenny or other sum of every horse-load or cart-load which passes through the town, to have the money to inclose the same; and also the king grants to me pontage, and that I

may take of every load a certain sum for the making the bridge with the same money, the grants are good, because the king may charge his people of the realm without special assent of the Commons, to a thing which may be to the profit of the common people. But if the king grant such murage to a man, and grants further that he may take a certain custom of every load when I and my tenants shall pass through the said town, although two or more of my tenants pay to him rent or custom for their loads, I may well disturb him from taking such custom when I pass through the town with my loads; for the grant is void in such case, because no man shall be charged in special in such case." And *Skrene*, J., says, (fo. 5 a.) "Thorough-toll is a toll which is taken from persons who pass with carriages through a town from time immemorial, and he who is now lord of the town forfeits the seigniory to the king, and afterwards the king by his patent grants that I may collect his toll; now this is an office whereof there was no officer before. And so it is where murage is granted to a man, and by the same patent the king grants that I may collect it, and moreover a writ issues to the sheriff to proclaim the said patent in the county. After that is done it is a good office in me. And also to the other extent I say that I may have a ferry over a certain water adjoining my own land, and that I may take of every man a farthing (un mail), or more or less, the grant is good." *Huls*, J., says, "In your case of thorough-toll it is not marvel, because such toll was not due before the patent made to you; and of your case of the ferry it is not marvel, because those who make the payment have *quid pro quo*."

WATTS *v.* FRIEND.

ASSUMPSIT. The declaration stated that on the 28th May, 1827, in consideration that the plaintiff would supply the defendant with turnip-seed to sow certain land of the defendant, the defendant agreed to sell to the plaintiff the whole of the turnip-seed which should be produced from the land, at the price of one guinea *per Winchester bushel*, and deliver the same to the plaintiff at the usual time after harvest and thrashing. Averment, that the plaintiff supplied the seed, and that the defendant

An agreement by which *A.* was to furnish *B.* with turnip-seed to sow his land, and *B.* was to sell *A.* all the turnip-seed produced from the land at 1*l.* 1*s.* per bushel, was held to require a note in writing under the 17th section of the statute of frauds, the value of the crop having in fact exceeded 10*l.*

Whether under 5 *Geo.* 4, c. 74, s. 15, an agreement to sell seeds by the Winchester bushel, without expressing the ratio or proportion which such Winchester bushel bears to the standard measure, is void, *quære.*

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sowed it, and harvested the crop, which produced 240 bushels of turnip-seed. Breach: that the defendant did not within such several times, or at any other time, deliver the turnip-seed to the plaintiff, but delivered it to some other person, whereby plaintiff was obliged to purchase at a higher price in order to enable him to deliver the same to persons to whom he had sold. Plea: non assumpsit. At the trial at the last Maidstone assizes before Lord *Tenterden*, C. J. the following facts appeared:

28 May, 1827. A verbal agreement was entered into between the parties, to the effect stated in the declaration. The price of turnip-seed having afterwards risen, the defendant refused to deliver the seed according to his contract, and the plaintiff was obliged to make purchases elsewhere to enable him to complete contracts of sale which he had made in anticipation of receiving the defendant's seed. The defendant contended that the contract was void under the 17th section of the statute of frauds, and also under the Uniformity of Weights and Measures Act (*a*). A verdict was found for the plaintiff, and the learned judge gave the defendant leave to move on both points. A rule nisi for entering a nonsuit having been obtained,

Gurney (with whom was *Comyn*) shewed cause. At

(*a*) 5 *Geo.* 4, c. 74, which enacts (s. 15), "that from and after the first day of May, 1825, all contracts, bargains, sales, and dealings which shall be made or had within any part of the united kingdom, for any work to be done, or for any goods, wares, merchandize, or other thing to be sold, delivered, done, or agreed for by weight or measure, where no special agreement shall be made to the contrary, shall be deemed, taken, and construed to be made and had, according to the standard weights and measures ascertained by this act; and in all cases where any special agreement shall be made, with reference to any weight or measure established by local custom, the ratio or proportion which every such local weight or measure shall bear to any of the said standard weights or measures shall be expressed, declared and specified in such agreement, or otherwise such agreement shall be null and void."

the trial two objections were raised. The first rests upon the late statute respecting weights and measures, (5 *Geo.* 4, c. 74, s. 15.) The answer to that objection is simply this, that the clause in question refers to *local* measures only, and not to sales by the Winchester bushel, which, at the time when the statute passed, was not a *local* measure, but *general* throughout the kingdom. The second objection is, that the contract was not reduced into writing and signed at the time, though it was reduced into writing immediately afterwards. The cases which have been decided with reference to the 17th section of the statute of frauds, shew that a written contract was not necessary; *Towers* v. *Osborne* (*a*), *Clayton* v. *Andrews* (*b*), *Rondeau* v. *Wyatt* (*c*), *Cooper* v. *Elston* (*d*). In *Groves* v. *Buck* (*e*), a contract for the delivery of oak-pins which were not then made, was held not to be within the 17th section, because "the subject-matter of the contract did not exist in rerum naturâ,—it was incapable of delivery and of part acceptance, and when that is the case, the contract has been held not to be within the statute of frauds." So here, the seeds to be delivered had no existence at the time of the contract, *Garbutt* v. *Watson* (*f*), *Crosby* v. *Wadsworth* (*g*), *Parker* v. *Staniland* (*h*), *Warwick* v. *Bruce* (*i*), (*Bayley*, J. referred to *Mayfield* v. *Wadsley* (*k*), and *Evans* v. *Roberts* (*l*).) It has been held that growing crops are seizable under a fieri facias; they are therefore goods and chattels which go to the executor, and not to the heir.

Spankie, Serjt. contrà, was stopped by the Court.

(*a*) 1 Stra. 506.
(*b*) 4 Burr. 2101.
(*c*) 2 H. Bla. 63.
(*d*) 7 T. R. 14.
(*e*) 3 Maule & Selw. 178.
(*f*) 5 Barn. & Ald. 613; and 1 Dowl. & Ryl. 219.
(*g*) 6 East, 602.
(*h*) 11 East, 362.
(*i*) 2 Maule & Selw. 205.
(*k*) 3 Barn. & Cressw. 357, and 5 Dowl. & Ryl. 224.
(*l*) 5 Barn. & Cressw. 829, and 7 Dowl. & Ryl. 611. And see *Smith* v. *Surman*, *ante*, vol. iv. 455, and 9 Barn. & Cressw. 561.

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WATTS v. FALLER.

Lord TENTERDEN, C. J.—This rule must be made absolute. We need not decide the question upon the statute of weights and measures, which is a very important one. If persons may lawfully contract by the Winchester measure, the statute will be in a great measure nugatory. In every sense of the words, whether we look to their legal construction or to their common acceptation, this is a contract respecting the sale of goods. Being a contract for the sale of goods above (*a*) the value of 10*l.* it is void by the 17th section of the statute of frauds, for want of a note in writing.

Rule absolute.

(*a*) *i. e.* not *necessarily*, but by the *event*. If the quantity of seed produced had not exceeded 9 bushels the price would have amounted, not to 10*l.* but to 9*l.* 9*s.* only. *Quære*, therefore, whether the original agreement was a "*contract* for the sale of any goods, wares, and merchandizes *for the price* of 10*l.* or upwards."

BERKELEY *v.* DEMERY and WHITE.

Where *B.* commits a trespass on the land of *A.* by the direction and for the benefit of *C.*, and *A.* sues *B.* alone, the Court will not order *C.* to pay *A.*'s costs.

TRESPASS for entering the close of the plaintiff, and cutting furze and heath there growing. Plea: not guilty. At the trial at the last summer assizes for the county of Gloucester, it appeared that the defendants had cut the furze and heath by the direction of one *Hill*, by whom they were afterwards used. Verdict for the plaintiff. Judgment having been signed for 41 1*l.* 13*s.* 6*d.* damages and costs, and the defendants being unable to pay the same,

Taunton now moved for a rule calling upon *Hill* to shew cause why he should not pay to the plaintiff the amount of the judgment, and referred to *Thrustout* v. *Shenton* (*a*).

(*a*) *Post*, 443 n.

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BERKELEY v. DEMERY and WHITE.

Lord TENTERDEN, C. J.—There is a material distinction between an action of trespass quare clausum fregit and an action of ejectment. In ejectment no person is allowed to defend as tenant but the party in actual possession; in trespass, all the parties may be sued. Before the writ issues the plaintiff should take the trouble to inquire what parties are chargeable with the trespass of which he complains. If this rule were granted applications of this nature would be without end.

LITTLEDALE, J.—Granting this rule would be opening a door for a similar motion in every species of action.

Rule refused (*a*).

(*a*) THRUSTOUT *d.* JONES and another *v.* SHENTON.

SEPARATE declarations in ejectment were served upon the defendant, upon *Hawford*, and upon *Wright*. *Wright* occupied part of the premises sought to be recovered, and the remainder was in the occupation of the defendant and of *Hawford* respectively, as tenants to *Wright*. *Wright*, instead of defending as tenant for part, and as landlord for the remainder, obtained a rule ordering that the three causes should be consolidated and abide the event of the trial of the action against *Shenton*. The defence was conducted by *Wright's* attorney. A verdict having been found and judgment entered up for the plaintiff in the action against *Shenton*, at the Stafford spring assizes 1829, the lessor of the plaintiff executed a writ of habere facias possessionem, and was put into possession of all the property. A rule nisi having been obtained, calling upon *Wright* to shew cause why he should not pay the costs of the action tried against *Shenton* and the costs of the application;

Gurney and *Whateley*, in shewing cause, contended that the lessor of the plaintiff had mistaken his course,—that if he was apprehensive of losing his costs in case he succeeded against *Shenton*, whom he knew to be insolvent, he might have required as a term of the consolidation rule, that the action against *Wright* should be selected as the action to be tried.

Campbell and *W. J. Alexander* contrà. *Wright* is the person beneficially interested in *all* the property, and as such directed the defence.

Separate ejectments being brought by *A.* against *B.* and *C.* tenants in possession respectively of parts, and *D.* who is tenant in possession of the remainder of the premises sought to be recovered; and *D.* claiming to be landlord of *B.* and *C.*, obtains a rule to consolidate the causes, the ejectments against *B.* and *D.* abiding the event of the trial of the action against *C.* A verdict being found for *A.* against *C.* the Court ordered *D.* to pay to *A.* his costs of the action tried; but refused to order him to pay the costs of the application to the Court. *Semble*, that *A.*'s proper course would have been to have brought only one ejectment against the three,—or to have moved to set aside the appearance and pleas, unless *D.* would defend as landlord,—or to have obtained a consolidation rule in which *D.* should have been directed to pay the costs in all the actions, in case a verdict should be found for the plaintiff.

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The consolidation rule was a mere contrivance for the purpose of evading the payment of the costs of an action which his wrongful occupation, by himself and his tenants, of the property belonging to the lessor of the plaintiff, rendered unavoidable.

BAYLEY, J.—The action against *Shenton* having been defended by the direction of *Wright* and for his benefit, he ought to pay the costs of the action. But *Wright* ought not to be required to pay the costs of this application. If *one* action only had been brought, an order might have been obtained to include all the three tenants in possession in the declaration, in which case *Wright* might have been called upon for the costs,—or after appearance a rule or order might have been obtained calling upon the defendants to shew cause why the appearances and pleas should not be set aside, and judgment signed against the casual ejector, unless *Wright* would defend as landlord in respect of the premises in the possession of *Shenton* and *Hawford*,—or a consolidation rule might have been obtained on behalf of the plaintiff, directing that the ejectments brought against *Shenton* and *Hawford* should abide the event of the verdict in the action against *Wright*, and that *Wright* should pay the costs of all the actions in the event of a verdict being found for the plaintiff. As the lessors of the plaintiff chose, however, to proceed against *Shenton* and *Hawford*, without making any application to the Court or a Judge, I think they are not entitled to the costs of this motion.

Rule absolute without costs.

BENNETT *v.* DANIEL.

A warrant-of-attorney subject to a defeazance which is not written upon the same paper or parchment, is valid between the parties, though it would be void against the assignees of a bankrupt or of an insolvent.

UPON a reference to the Master, of a rule for setting aside a warrant-of-attorney, an objection was taken that the *defeazance* was not written upon the same paper with the warrant-of-attorney, and that the instrument was therefore void under 3 *Geo.* 4, c. 39, s. 4, and the case of *Morris* v. *Mellin*(*a*) was left with the Master. The Master holding the instrument to be void, reported in favour of the defendant, without entering into the merits. In Michaelmas term *Coleridge* obtained a rule for the Master to review his report. In the same term,

Follett shewed cause. The Master was right in consi-

(*a*) 9 Dowl. & Ryl. 503, and 6 Barn. & Cress. 406.

dering the warrant-of-attorney as void, under 3 *Geo.* 4, c. 39. Having seen the affidavits, and read the case of *Morris* v. *Mellin*, he had a right to form his own conclusions. If he had all the facts and the law before him, the Court will not send the case back to him. The Master has not decided on the ground of the instrument being void, but if he had so decided, it is submitted that such decision would have been right. The defeazance should have been written on the warrant-of-attorney before it was filed. *Morris* v. *Mellin* was the case of an insolvent, *Shaw* v. *Evans*(*a*), and *Sansom* v. *Goode*(*b*). The two clauses (of the Act) apply to distinct matters. The clause on which the Master has acted is that contained in the latter part of the fourth section. The first section gave liberty to file the warrant-of-attorney within twenty-one days. The second section makes warrants-of-attorney, which have not been so filed, void as against the assignees of a bankrupt conusor. The third section puts cognovits upon the same footing. [*Bayley*, J. The third section is compulsory.] It is difficult to see that the third section is compulsory. The fourth section makes the warrant-of-attorney void, where the defeazance is not upon the same paper or parchment, not as against the assignees, but to all intents and purposes. The introduction of the latter words shews that the intention of the legislature was to make a difference between omitting to file the warrant-of-attorney and omitting to enter the defeazance. [*Parke*, J. The object seems to be to compel the creditor to give a true account.] It is said that this must be understood to apply only to cases of bankruptcy, because it is extended by the Insolvent Debtors' Act to persons taking the benefit of that act. Such a provision was necessary, because the second and third sections are confined to cases of bankruptcy. The word *such*, relied on in *Morris* v. *Mellin*, means that the judgment must be confessed in a *personal action*.

(*a*) 14 East, 576. (*b*) 2 Barn. & Alders. 568.

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Coleridge, contrà. This rule must be made absolute on two grounds:—First, the merits were never investigated. Second, the Master was bound by the decision of this Court in *Morris* v. *Mellin*. [*Bayley*, J. He is bound by the *law*, and not by the *mistake of the Court*. He should have heard the law discussed.] The warrant-of-attorney need not be filed where the judgment is entered up within the twenty-one days. It is unnecessary to write the defeazance where it is unnecessary to file the warrant-of-attorney.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered judgment.—This case was brought before us for the purpose of reviewing the judgment of this Court in *Morris* v. *Mellin*. I am of opinion that the construction there put on the statute, 3 *Geo.* 4, c. 39, by the majority of the judges, was correct, and that this instrument is not void as between the parties, from omitting to put the defeazance upon the same paper. The act is intituled, "An act for preventing frauds upon creditors by secret warrants-of-attorney to confess judgment." The preamble of the act recites that injustice is frequently done to creditors by secret warrants-of-attorney; and the first section enacts that every warrant-of-attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeazance and indorsements thereon, shall, if the holder think fit, be filed within twenty-one days after the execution thereof. The second section enacts, that "if at any time after the expiration of twenty-one days after the execution of such warrant-of-attorney, (extended to cognovits by section 3,) a commission of bankrupt shall be issued against the person who shall have given such warrant-of-attorney, under which he shall be duly found and declared a bankrupt, then and in such case, unless such warrant-of-attorney, or a copy thereof, shall have been filed as aforesaid, within the said space of twenty-one days from the execution thereof, or un-

less judgment shall have been signed, or execution issued, on such warrant-of-attorney within the same period, such warrant-of-attorney, and the judgment and execution thereon, shall be deemed fraudulent and void *against the assignees* under such commission, and such assignees shall be entitled to recover back and receive, for the use of the creditors of such bankrupt at large, all and every the moneys levied, or effects seized, under and by virtue of such judgment and execution." Then comes the fourth section, on which the question arises, "That if such warrant-of-attorney or cognovit shall be given, subject to any defeazance or condition, such defeazance or condition shall be written on the same paper or parchment on which such warrant-of-attorney or cognovit actionem shall be written, before the time when the same or a copy thereof respectively shall be filed, otherwise such warrant-of-attorney or cognovit actionem shall be null and void *to all intents and purposes*." It was contended, that by reason of the generality of the latter words, all warrants-of-attorney are included in the fourth section. But even this section only says that the defeazance shall be written on the warrant-of-attorney or cognovit, "before the time when the same, or a copy thereof, shall be *filed*." It does not therefore extend to warrants-of-attorney *not filed*. This seems to restrain the generality of the words in question. The fourth section speaks of *such* warrant-of-attorney or cognovit. This is a double reference to the securities mentioned in the preceding sections, and it appears, by 7 *Geo.* 4, c. 57, s. 33, that the 3 *Geo.* 4, c. 39, s. 4, was understood by the legislature to be applicable to those securities only which are mentioned in the second and third sections. I therefore think that the Master was mistaken in supposing that he was restricted from inquiring into the merits of the case.

PARKE, J.—My opinion is at variance with the opinion pronounced by my Lord, in which my learned brothers, I understand, also concur. The fourth section declares the

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securities to be absolutely void. The only safe mode of construing an act of parliament is to take words in their plain and ordinary sense, unless a different intention clearly appears. There is not, I think, sufficient in this act to authorize our construing these words in any other sense. It is true, that in some cases words may be construed otherwise. Gifts and grants declared by 1 *Eliz.* c. 19, s. 5, to be "utterly void and of none effect to all intents, constructions, and purposes," have been held to be good against the lessor, though granted for a longer term than twenty-one years, or three lives. There, however, it appears from the language of the statute that its object was to protect and benefit the *successor*.

BAYLEY, J., expressed his concurrence with the judgment of Lord *Tenterden*.

LITTLEDALE, J., concurred, and referred to the reason stated in *Morris* v. *Mellin*.

Rule absolute.

WILSON *v.* BAGSHAW and another (*a*).

A plea that *A.* being seised of Whiteacre and Blackacre, always used a way over Whiteacre to Blackacre, and afterwards conveyed Blackacre, "together with all ways and appurtenances whatsoever," to *B.*, is not a sufficient justification of an entry into Whiteacre by *B.*

If at the time of the conveyance *A.* had no access to Blackacre by a way appurtenant in alieno solo, that circumstance should be alleged.

Or it should be pleaded as a *grant* of the way.

TRESPASS for breaking and entering a close called Burr's Hill, at Great Hucklow, in the county of Derby, and depasturing cattle there. Pleas: first, the general issue; secondly, that long before the plaintiff had any thing in the said close in which &c., to wit, on the 10th April, 1807, one *John Remington*, and one *Barnard John Wake*, at one and the same time, were seised in their demesne as of fee of and in a certain close, called Black

(*a*) Argued in the Bail Court, 25th April, 1829.

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Titch, whereof the said close in which &c. then was parcel, and of and in certain other closes called Loure Greaves and Fox Burrs, *and the said J. R., and B. J. W., by themselves, their farmers and tenants,* occupiers of the said last-mentioned close, during all the time they were seised of the said several closes as hereinbefore mentioned, and until and at the time of the alienation thereof by the said *J. R.* and *B. J. W.*, as hereinafter mentioned, used and enjoyed a certain way for themselves and their servants to go, return, pass and repass on foot, and with cattle, carts, carriages, and waggons respectively, from and out of a certain common highway, into, through, over, and along the said close called Loure Greaves, unto, into, over, and along the said close called Black Titch, unto, into, through, over, and along the said close in which &c., so being part and parcel thereof as aforesaid, unto and into the said close called Fox Burrs, and so back again from the said close called Fox Burrs, in and along the said way, unto, and into the said common highway, every year and at all times of the year, for the more convenient use and occupation of the said close called Fox Burrs. And the defendants further say, that the said *J. R.* and *B. J. W.*, being so seised of the said several closes as hereinbefore-mentioned, and so using, having, and enjoying the said way in this plea mentioned, afterwards, to wit, on &c., at &c., enfeoffed defendant *Bartholomew* of the said close called Fox Burrs, *together with all ways and appurtenances whatsoever* to the said last-mentioned close belonging, habendum unto defendant *Bartholomew*, his heirs and assigns; by virtue of which feoffment defendant *Bartholomew* afterwards, to wit, on &c., at &c., became and was seised of the said close called Fox Burrs, with the appurtenances, as hereinbefore-mentioned, in his demesne as of fee, and became and was entitled to such way as in this plea mentioned, there being before and at the time of the said feoffment no other way to the said close called the Fox Burrs from the said common and public highway, and which

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last-mentioned way hath from time to time since been used accordingly by the defendant *Bartholomew* and his tenants, occupiers of the said last-mentioned close. And the defendants, in fact, say that the defendant *Bartholomew*, being so seised of the said last-mentioned close, and being so entitled to the said way as aforesaid, afterwards, and at the said several times when &c. having occasion &c.

The third plea, instead of claiming the way at all times of the year, stated the right to be "at certain periods of the year, ss. at those periods when the close called Black Titch was not under the plough or sown with corn."

The fourth plea stated, that *J. R.* and *B. J. W.* having no other way to Fox Burrs, used the said way as a way of necessity, and that the defendant *Bartholomew* has, since the alienation, used it as a way of necessity.

The plaintiff demurred generally to the second and third pleas, and took issue on the fourth plea.

The plaintiff also newly assigned trespasses on other occasions, and with unnecessary violence.

To the new assignment the defendant pleaded, first, not guilty; secondly, leave and licence; and thirdly, a plea similar to the third plea to the declaration.

The plaintiff took issue upon the leave and licence alleged in the second plea to the new assignment, and demurred to the last plea.

Holroyd, for the defendant, in support of the demurrers. The question here is, whether, under this feoffment, a right to a way used by the feoffor over his own land passed. [*Bayley*, J. The pleas do not negative there being any other way to get at the close. *Parke*, J. Where there are ways in alieno solo, these words of conveyance will be satisfied.] In *Harding* v. *Wilson* (*a*) it was held, that by a demise of land, "with all ways thereunto appertaining," a road over the soil of the lessor would not pass; but that it

(*a*) 3 Dowl. & Ryl. 287; 2 Barn. & Cressw. 96.

would have been otherwise if the lease had contained the words "heretofore used." (*a*) In this case the feoffor could not have a way appurtenant, being seised of the whole. The words "belonging to or appertaining," will not operate as a new grant, *Grymes* v. *Peacocke* (*b*).

Wightman, contrà. This plea was framed upon the authority of the case of *Morris* v. *Edgington* (*c*), where it was held, that if a party having used a way from his close over other land of his own adjoining, demises the close *with all ways appurtenant*, such way passes to the lessee. The language of the deed is to be taken most strongly against the party whose words are to be construed (*d*).

BAYLEY, J.—In *Morris* v. *Edgington*, it appeared that the lessor had no way appurtenant in alieno solo, and it was taken as a question of fact, whether, under the circumstances, the way passed under the words of the demise. In pleading a deed the party pleading it is bound to state the deed according to its legal operation (*e*). If the defendant had pleaded that he was enfeoffed of the close *and way*, the jury might have found that he was so, if the whole of the facts taken together would have warranted such a conclusion. The rule *fortius contra proferentem* does not apply to a case where the adverse party has pleaded according to the legal operation of the deed. Here, the Court are bound to consider whether the way was appurtenant at the time of the conveyance.

LITTLEDALE, J., concurred.

PARKE, J.—To bring himself within the case of *Morris* v. *Edgington*, the defendant might have alleged that

(*a*) And see *Whalley* v. *Thompson*, 1 Bos. & Pull. 371.
(*b*) 1 Bulstr. 17.
(*c*) 3 Taunt. 24.
(*d*) *Vide* 1 Wms. Saund. 258 a.
(*e*) *Vide* ib. 235, b. n. (9); 2 Wms. Saund. 97, b. n. (2); Com. Dig. *Pleader* (C 37).

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there was no way appurtenant in alieno solo, or he might have pleaded a *grant* of the close and way (*a*).

Judgment for the plaintiff (*b*).

(*a*) Under an issue taken upon the former allegation, it would lie upon the plaintiff to prove the existence of an appurtenant way; whereas under an issue taken on the grant, the defendant must prove the grant before he could require proof of the way. This would, however, give to the defendant the opening and the reply.

(*b*) And see *Saundeys* v. *Olife*, Sir F. Moore, 467; *Clements* v. *Lambert*, 1 Taunt. 205; *Barwick* v. *Matthews*, 5 Taunt. 365; *Kooystra* v. *Lucas*, 1 Dowl. & Ryl. 506, 5 Barn. & Alders. 830; *Barlow* v. *Rhodes*, 1 Crompt. & Mees. 439, 3 Tyrwh. 680; *Plant* v. *James*, 2 Nev. & Mann. 517, 5 Barn. & Adol. 791.

FURNISH *v.* SWANN.

Where an action of trover, in which the damages are laid under 20*l.*, is removed by the defendant from an inferior into a superior Court, without entering into a recognizance to pay the *debt* and costs pursuant to 7 & 8 *Geo.* 4, c. 71, s. 6, the plaintiff is entitled to a procedendo.

So, though the return to the certiorari has been filed.

TROVER in the Court of the Guildhall of the city of Norwich. The damages were laid in the declaration at 10*l.* The defendant removed the cause by certiorari, but omitted to enter into the recognizance for payment of the debt and costs in case the judgment should pass against him, which is required by the 7th and 8th *Geo.* 4, c. 71, s. 6, upon the removal of actions in inferior Courts where the cause of action does not amount to 20*l.* After the return to the writ of certiorari had been filed, a rule was obtained calling upon the defendant to shew cause why a writ of procedendo should not be awarded.

Austin now shewed cause. This being an action of trover, it was unnecessary to enter into the recognizance mentioned in the act. That recognizance is for payment of the *debt* and costs; but in *trover*, which is an action brought to recover damages resulting to the plaintiff from the wrongful act of the defendant, in appropriating to his own use certain specific chattels belonging to the plaintiff,

there is no *debt*(*a*), or at all events none of an assignable amount.

Another objection to making this rule absolute is, that it was obtained after the return had been filed; and therefore, according to the rule of practice, the record cannot now be remanded (*b*).

F. Kelly, contrà. The act of 7 & 8 *Geo.* 4, c. 71, extends the provisions of 19 *Geo.* 3, c. 70, s. 6, to *all actions* in inferior Courts where the *cause of action* shall not amount to 20*l.*, exclusive of costs (*c*). This enactment is general in its terms, and applies equally to actions of trover as to all others. A positive enactment of the legislature cannot be nullified by a rule of practice; and therefore the rule which has been referred to, if any such there be, can furnish no answer to this application.

By the COURT.—The enactment requiring the recognizance to be entered into, is general, and applies equally to actions of trover as to other actions. The record having been brought into this Court in direct contravention of the terms of an act of parliament, which says, that no such record shall be removed unless the defendant shall have entered into the recognizance, cannot be retained; it must go back to the inferior Court.

Rule absolute.

(*a*) It was ruled by Lord *Ellenborough*, C. J., that an action of trover brought to recover damages for the conversion of goods by means of a wrongful sale, may be described, even in pleading, as an action brought to recover the particular sum for which the goods were sold. And the Court of King's Bench confirmed this ruling, and refused to grant a rule nisi for a new trial. *Batchellor* v. *Salmon*, 2 Campb. 525. So, e converso, a demand of the "*amount* of goods which you have disposed of," and a refusal to pay, are a good demand and refusal to constitute evidence of a conversion in trover. *Thompson* v. *Shirley*, per Lord *Kenyon*, C. J., 1 Esp. N. P. C. 31; *Rookeby's* case, Clayton, 122, pl. 114.

(*b*) *Vide Walker* v. *Gann*, 7 Dowl. & Ryl. 769.

(*c*) But not to *ejectment*. *Vide Doe* d. *Stansfield* v. *Shipley*, 2 Dowl. P. C. 408.

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WRIGHT, Administratrix, *v.* NUTTALL, Gent., one &c.

Under 43 *Eliz.* c. 6, a judge may certify to deprive of his costs, a plaintiff who recovers less than 40*s.*, even where the defendant is privileged to be sued in the superior Courts only.

So, where the defendant is not amenable to an inferior Court by reason of his not residing within the jurisdiction within which the cause of action arose, *semble.*

ASSUMPSIT for work and labour done by the intestate, who was a sheriff's officer, brought to recover the balance of an account for caption fees. Plea: non assumpsit as to all but 10*s.* 6*d.*, and as to that sum a tender *to the plaintiff as administratrix.* Replication; denial of the tender.

At the trial before *Alexander*, C. B., at the last Nottingham assizes, the plaintiff obtained a verdict negativing the tender, (which had been made before administration granted,) damages 10*s.* 6*d.*; and the learned judge certified under 43 *Eliz.*, c. 6, to deprive the plaintiff of her costs. In Michaelmas term a rule was obtained by *White*, calling on the defendant to shew cause why the Master should not tax the plaintiff's costs, notwithstanding the certificate, on the ground that where the defendant is an attorney the statute does not apply.

N. R. Clarke, on a former day in this term, shewed cause (*a*). By 43 *Eliz.*, c. 6, s. 2, "If upon any action personal, to be brought in any of Her Majesty's courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same Court, and be so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same Court shall not amount to the sum of forty shillings or above, the judges and justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less, at their discretions." The reference, in the preamble of the act, to suits "which, by the due course of the laws of this realm, ought to be determined in inferior Courts in the country," will be

(*a*) Before *Bayley*, J. and *Parke*, J., 6 Feb. 1830.

relied on for the plaintiff; but where the enacting part of a statute is clear, it is not to be controlled by the preamble. Here, the enacting clause is clear, and extends to attorneys as well as all other defendants. [*Bayley*, J. The plaintiff cannot know that the defendant, if sued in the County Court, will not set up his privilege. *Parke*, J. In many cases the County Court may not have jurisdiction,—as where the cause of action arises in one county, and the defendant is resident in another.] That is a case in which a judge, in the exercise of the *discretion* given him by the statute, would refuse to certify. This, which is a statute for the prevention of vexatious litigation, has been always considered to be very beneficial to the public, and therefore entitled to receive a liberal construction. For this reason it has been held that the large words of the enacting clause are not to be narrowed by the more limited expressions of the preamble. *Dand* v. *Sexton* (*a*), *Pyeburn* v. *Gibson* (*b*).

White, contrà. Had the plaintiff sued in the County Court, the proceedings in that Court would probably have been defeated by the defendant's privilege. It cannot be said that the defendant is entitled to be sued in a superior Court only, and yet that the plaintiff was bound to sue in the inferior Court. The defendant could not have pleaded to this action that he was resident in an inferior jurisdiction, and that the debt sued for was recoverable there. *Gardner* v. *Jessop* (*c*), *Wiltshire* v. *Lloyd* (*d*). This therefore is not an action "which, by the due course of law, ought to be determined in an inferior Court." The privilege of an attorney is considered as the privilege of the client, whose business ought not to be delayed by withdrawing the attorney from the Court of which he is an officer, to a remote jurisdiction. *Harper* v. *Tahourdin* (*e*).

(*a*) 3 T. R. 37.
(*b*) 8 B. Moore, 450.
(*c*) 2 Wils. 42.
(*d*) 1 Dougl. 381.
(*e*) 6 Maule & Selw. 383. And see Bac. Abr. *tit.* "Attorney" (G).

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Attorneys are therefore not liable to be sued in Courts of Conscience, unless brought within the jurisdiction by express enactment. And in analogous cases, arising on other statutes, the like construction has prevailed. *Armington's* case(*a*), *Board, one &c.* v. *Parker*(*b*), *Johnson, one &c.* v. *Bray*(*c*).

Cur. adv. vult.

BAYLEY, J., after stating the facts and the argument, now delivered the judgment of the Court as follows:—

No costs were recoverable at common law. Costs were first given by the Statute of Gloucester(*d*). The right created by that statute is limited by 43 *Eliz.* For the plaintiff it was contended, that as an attorney is privileged to be sued in the Court in which he is admitted, and the preamble of the statute refers to suits "which ought to be determined in inferior Courts in the country," suits which cannot be so determined are to be considered as impliedly excepted out of the enacting clause, notwithstanding the generality of the language there used. *Dand* v. *Sexton* is an express authority against such a construction of the statute; and we are of opinion that it ought not to be so construed. If the objection founded on the attorney's privilege were to prevail, there would be the same reason for excluding the power of certifying in the case put by my brother *Parke* during the argument, of a defendant residing in a different county from that in which the cause of action accrued; for then the plaintiff would not have the means of summoning the defendant in any inferior Court.

Lord TENTERDEN, C. J.—I entirely agree with the judgment which has just been delivered. The statute of *Eliz.* ought to receive a liberal construction, so as to prevent the bringing of actions in the superior Courts for

(*a*) Palmer, 403.
(*b*) 7 East, 47.
(*c*) 2 Brod. & Bingh. 698, and 5 B. Moore, 622.
(*d*) 6 *Edw.* 1, c. 1. And see 2 Inst. 288.

small sums and for trifling causes. Where less than forty shillings is recovered in a superior Court, no benefit can accrue to the plaintiff. Such suits can be commenced only from vindictive motives (*a*), or for the benefit of those persons by whom they are professionally conducted.

Rule discharged.

(*a*) A trader may perhaps, without *vindictive* motives, find it expedient, with reference to his general dealings, to sue a customer who refuses to pay a debt of 30*s*., solely and avowedly because it would cost his creditor five times as much to proceed against him.

WILLIAM, Lord Bishop of EXETER and GEORGE PYKE DOWLING, clerk, *v.* JENEFER GULLY, JEREMIAH TRIST, JOHN HEARLE TREMAYNE, and THOMAS GRAHAM, in Error.

A presentation by *A.* is a sufficient possession to support a quare impedit by *B.*, a party claiming under the youngest daughter and coheir of *A.*, after severance amongst the coparceners, by reason of their disagreeing in presentation.

ERROR upon a judgment in quare impedit, given by the Court of Common Pleas, for Gully and others, the plaintiffs below, (now defendants in error,) against the Bishop and Dowling, the defendants below, (now plaintiffs in error).

The declaration stated, that *Richard Roberts*, Esq., on the 23rd May, 1608, being seised of the advowson of the rectory and parish church of Berrynarber, in the county of Devon, and diocese of Exeter, in gross by itself, as of fee and of

In quare impedit by *B.* a party claiming under the fourth daughter and coheir of *A*, the declaration alleges, that after severance by disagreement, the eldest daughter presented in the first turn, and that unknown persons successively presented *as in* the turns of the second and third coparceners, Held, that these presentations must be taken to have been *by right*, and not *by usurpation*:—but that if made by usurpation, they would not destroy the effect of the presentation by the common ancestor, as sufficient to support the *possessory* right of all the coparceners.

A conveyance of the purparty of the youngest of four coparceners, when the church is full upon the presentation of the eldest, expressed to be made "in consideration of 20*s*. and of faithful service done to the grantor, as also for divers good and valuable causes and considerations him thereunto moving," is not necessarily fraudulent as against a subsequent purchaser for value.

A Court of Error will not inquire into the propriety of a rule made by one of the Superior Courts for amending the declaration; or of a rule for setting aside a rule to plead several matters, and for striking out pleas filed in accordance with such rule,—or of a rule for setting aside a nonsuit, although the nonsuit has been obtained in a form of action (quare impedit) in which a nonsuit is made *peremptory* by statute.

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right, presented to the said church, then being vacant by the death of the then last incumbent thereof, one *Wm. Hearle*, his clerk, who, on the presentation of the said *Richard Roberts*, was afterwards, to wit, on the day and year aforesaid, admitted, instituted, and inducted into the same in time of the peace of the Lord *James* 1, late king of England;—that *Richard Roberts* died intestate on the 25th December, 1622, whereupon the advowson descended in coparcenary to his four daughters, viz. *Mary* the wife of *Thomas Westcott*, *Jane* the wife of *William Squire*, *Prudence* the wife of *John Amory*, and *Grace* the wife of *Francis Isaac*; whereupon the said *Thomas Westcott* and *Mary* his wife, in right of the said *Mary*, the said *William Squire* and *Jane* his wife, in right of the said *Jane*, the said *John Amory* and *Prudence* his wife, in right of the said *Prudence*, and the said *Francis Isaac* and *Grace* his wife, in right of the said *Grace*, became and were seised of the said advowson, in gross by itself as of fee and of right;—that the said church, on the 27th of January, 1630-1, became vacant by the death of the said *William Hearle*, whereupon it belonged to the said *Thomas Westcott* and *Mary* his wife, in right of the said *Mary*, the said *William Squire* and *Jane* his wife, in right of the said *Jane*, the said *John Amory* and *Prudence* his wife, in right of the said *Prudence*, and the said *Francis Isaac* and *Grace* his wife, in right of the said *Grace*, to present a fit and proper person to the said church, so then being vacant; but because they did not agree among themselves jointly to present, it belonged to the said *Thomas Westcott* and *Mary* his wife, in right of the said *Mary*, as eldest daughter of the said *Richard Roberts*, to present a fit person to the said church, so being vacant, for that turn, being the next and first avoidance after the death of the said *Richard Roberts*; whereupon the said *Thomas Westcott* and *Mary* his wife presented, in the first turn, one *George Westcott*, their clerk, who was thereupon admitted, instituted, and inducted;—that *Francis Isaac* and *Grace* his wife, on the 1st November, 1660, died so seised of the said purparty, or

one-fourth part of the said *Grace*, of the said advowson, upon whose death the same purparty, &c. descended to *Robert Isaac*, her son and heir(*a*); whereupon the said *Robert Isaac* became seised of the said purparty, or one-fourth part of the said advowson as of fee and of right;—that on the 10th July, 1674, the said church became vacant by the death of the said *George Westcott*; that thereupon one *Grace Westcott* afterwards (*b*), *as in the said second turn which was of the said Jane Squire*, on the 11th July, 1674, presented to the said church, so being vacant, one *Thomas Westcott*, her clerk, who was thereupon admitted, instituted, and inducted;—that on the 10th September, 1674, the church became vacant by the death of the said *Thomas Westcott*; that thereupon one *Edward Gibbon* and *Frances* his wife, *as in the third turn, which was of the said Prudence Amory*(*c*), afterwards, on the 24th Sept. 1674, presented to the said church, so being vacant, one *Henry Chichester*, their clerk, who was thereupon admitted, instituted, and inducted; that the said *Robert Isaac*, being so seised of the said purparty, &c. formerly of the said *Grace Isaac*, of the said advowson, on the 29th April, 1672, by deed-poll, sealed with the seal of the said *Robert Isaac*, (prolat. in curiam,) *in consideration of the sum of twenty shillings unto him Robert Isaac, by Lewis Stevings of Braunton, in the county of Devon, gentleman*(*d*), *and for true and faithful service*(*e*) *done unto him the said Robert Isaac, by the said Lewis Stevings, as also for divers other good and valuable causes and considerations him thereunto moving*, did freely and clearly give and grant unto the said *Lewis Stevings* the same purparty or fourth part of the advowson of the said church(*f*), habendum to the said *Lewis Stevings*, his heirs and assigns for ever; whereby the said *Lewis Stevings* became seised as

(*a*) The declaration had originally stated the descents from the three elder sisters also.

(*b*) As to the necessity of shewing *in what right* the presentations were made during the first, second, and third turns, see *post*, 485.

(*c*) The descent to Frances Gibbon had been originally stated in the declaration.

(*d*) Not said "paid."

(*e*) *Vide* 5 Bingh. 171, and 2 Moore & Payne, 266.

(*f*) *Vide post*, 470.

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of fee and of right of the same purparty &c., formerly of the said *Grace Isaac;* that being so seised, the said *Lewis Stevings* died, leaving *John Stevings*, his eldest son and heir, to whom the same purparty &c. thereupon descended, and who thereupon became seised thereof as of fee and right; that the said *John Stevings* being so seised, on 5th January, 1699–1700, (the said church being then filled by *Henry Chichester*, the then incumbent thereof,) by indenture delivered to *Henry Chichester*, and therefore not in possession of the plaintiffs, who produce counterpart (*a*), made between the said *John Stevings* of the one part, and *Henry Chichester* of the other part, the said *John Stevings* granted to the said *Henry Chichester*, his executors &c., the advowson &c. of the said church, for the first and next avoidance thereof; by means of which indenture the said *Henry Chichester* became possessed of the right of presentation to the said church for the next turn only, the reversion of the said purparty &c. formerly of the said *Grace Isaac*, belonging to the said *John Stevings;* that the same reversion, so belonging to the said *John Stevings*, the said church, on the 1st November, 1714, became vacant by the death of the said *Henry Chichester;* that thereupon one Sir *Nicholas Hooper*, on the 8th November, 1714, *as in the fourth turn, formerly of the said Grace Isaac as aforesaid*, presented to the said church, so being vacant, one *Edward Chichester*, as the said Sir *Nicholas Hooper's* clerk, who, upon such presentation, was admitted, instituted, and inducted into the same: that the said *John Stevings*, on the 1st January, 1719-20, died seised of the said last-mentioned purparty &c., having first devised the same purparty (*b*) &c. to his brother, *Richard*

(*a*) After the presentation had taken place, or at all events after the death of the presentee, the indenture would belong to the reversioner, to whom the grantee ought, and to whom he would be presumed, to have returned it; as in the case of a lease which, after the expiration of the term, belongs to the lessor, who thenceforwards is entitled to both lease and counterpart as muniments of his title. P. 38, H. 6, fo. 24, pl. 1; *Brewster* v. *Sewell*, 3 B. & Ald. 301.

(*b*) The language of the will was, "all my *lands* and *tenements*." An advowson in gross will pass by the word "tenement" in a devise, 4 Bingh. 290, and 12 B. Moore, 591; so à fortiori it will pass by

Stevings, (who died in the life-time of *John Stevings*,) if he should be living at the time of the death of the said *John Stevings*, otherwise to the children of the said *Richard Stevings*, as tenants in common; whereupon *Katherine*, afterwards *Katherine Bowen*, *Thomasine*, afterwards *Thomasine Maunsel*, *Susannah*, afterwards *Susannah Burgh*, *Jane*, afterwards *Jane Burgh*, *Grace*, afterwards *Grace Ridgate*, and *Elizabeth*, afterwards *Elizabeth Andrews*, who at the time of the making of the said will, and from thenceforth, until and at the time of the death of *John Stevings*, were the only children of *Richard Stevings*, became and were seised of the said last-mentioned purparty &c., formerly of the said *Grace Isaac*, in gross by itself, as of fee and right, as tenants in common thereof(*a*). The declaration then stated a conveyance by the nieces and their husbands, in 1719 and 1720, by bargain and sale inrolled, fine and recovery, and declaration of uses, to *Thomas Maunsel*

the word "hereditament," *Westfaling* v. *Westfaling*, 3 Atk. 460; *Haselwood* v. *Pope*, 3 Peere Wms. 322; but before the statute of 3 & 4 *Will.* 3, c. 74, it would not have passed by the word "land."

(*a*) Though the six nieces were heirs at law of *John Stevings*, yet the limitation to them expressly as tenants in common in the will, made them take by *purchase* as tenants in common, and not by *descent* as coparceners.

The will of *John Stevings*, after limiting several estates for life, devised the residue to his brother *Richard*, if living, otherwise to the children of *Richard*, with a proviso that three of those children should have 200*l.* more than the others. It was held, that a fee passed to the children of *Richard* under this devise, 4 Bingh. 293; 12 B. Moore, 591. In order, however, to avoid any question as to the effect of the will upon the second trial, a rule was obtained to amend the declaration, by adding a count, stating that the children of *Richard* took a *life* estate by devise as tenants in common, and the *reversion* in fee by descent as coparceners. This rule was made absolute upon argument, 4 Bingh. 525, and 2 Moore & Payne, 105. The necessity for this amendment was afterwards obviated by the rescinding of the rule to plead several matters, and by the refusal of leave to insert a plea taking issue upon the devise by the four nieces, in addition to the pleas impugning the deed-poll. *Ibid.*

As to amendments of the declaration in Quare impedit, see *Reppington* v. *Tamworth School*, 2 Wils. 118, 150. As to the insertion of a *second* count, see *Shepherd* v. *Bishop of Chester*, 6 Bingh. 435, and 4 Moore & Payne, 130.

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and *Robert Andrews*, (the husbands of two of the nieces,) and *Robert Incledon* and *Edward Fairchild*, in trust for sale; the death of *Fairchild*, and a conveyance by lease and release from the surviving trustees, in November, 1781, to *John Davie*;—that in 1770 *John Davie* died, having by his will devised the said purparty &c. to his eldest son *John* in tail male, other than the next presentation in his said fourth turn, which he devised to his second son, *William*; that in April, 1777, *William Davie* conveyed his next presentation, by lease and release (*a*), to *John Davie*, the entailee; that *John Davie* dying in 1790, the said purparty &c. descended to *Joseph*, his eldest son and heir male of his body, whereupon the said *Joseph Davie* became seised in tail male; that on the 5th May, 1731, the church became vacant by the decease of *Edward Chichester*; that thereupon one *Richard Hill, as in the said first turn*, which was formerly of the said *Mary Westcott*, presented one *Robert Bluett*, his clerk, who was admitted, instituted, and inducted;—that on the 27th February, 1749, the church again became vacant by the death of the said *Robert Bluett*, whereupon one *James Pearce* and *Mary* his wife, *as in the second turn*, which was of the said *Jane Squire*, presented one *John Seddon*, their clerk, who, upon the presentation of the said *James Pearce* and *Mary* his wife, was admitted, instituted, and inducted;—that on the 4th February, 1780, the church again became vacant by the death of the said *John Seddon*, whereupon one *Thomas Edwards*, *as in the third turn*, which was of the said *Prudence Amory*, presented one *Powell Edwards*, his clerk, who was admitted, instituted, and inducted;—that the said *Joseph Davie*, being so seised as aforesaid, on the 6th July, 1814, by a certain other indenture, for the considerations (*b*) therein mentioned, granted unto the said *William Slade Gully*, his executors, &c., the first and next advowson or avoidance, and donation, collation, right of nomination, presentation, and free dis-

(*a*) The word "grant" in this indenture of release would operate by way of *surrender*. *Ante*, 451.

(*b*) As to which see *post*, 487.

position of the church, when the same should first and next happen to become void by the death, resignation, cession, or deprivation of the said *P. Edwards*, or by any other ways or means whatsoever; by means whereof *W. S. Gully* became entitled to and was possessed of the then next avoidance and right of presentation to the said church, upon the death &c. of the said *Powell Edwards*, the then incumbent;—that being so possessed, the said *W. S. Gully*, on the 16th of November, 1816, died, having devised the said then next avoidance and right of presentation to the plaintiffs (below);—that the said church, in the lifetime of the said *Joseph Davie*, on the 30th of October, 1825, again became vacant by the death of the said *P. Edwards*, and yet is void; that such avoidance was the first and next avoidance of the said church, after the said grant to the said *W. S. Gully*, and after the said devise by the said *W. S. Gully* to the plaintiffs (below), to whom it therefore belonged to present a fit person to the said church, so being vacant as last aforesaid, as in the said turn formerly of the said *Grace Isaac* as aforesaid; but that the defendants (below) unjustly hindered them.

The bishop disclaimed.

Dowling craved oyer of the deed poll, 20th April, 1672, which was set out in hæc verba:—"To all Christian people to whom these pr'nts shall come, I *Robert Isaac*, of Westdowne, in the county of Devon, gent., the true and undoubted patron of the parish church of Berrynarber, in the county of Devon, in the diocesse of Exeter, send greetinge in our Lord God everlasteinge. Knowe yee that I the foresaid *Robert Isaac*, for and in cons'eracon of the sume of twentye shillings of lawefull money of England, unto me the said *Robert Isaac*, by *Lewes Stevings*, of Braunton, in the county of Devon aforesaide, gentleman, and for true and faithful service downe unto me the saide *Robert Isaac* by the said *Lewes Stevings*, as allso for divers other good and valluable causes and consideracõns me hereunto moveinge, have given and graunted, and by these presents doe freely

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and clearely give and graunt unto the said *Lewes Stevings*, the advowsion, donacõn, free disposition and right of patronage, and presentation of the rectorye and parish church of Berrynarber, in the county of Devon: To have and to holde the said advowson, donation, free disposition, and right of patronage, and p'sentation of the said rectory and parish church of Berrynarber aforesaid, unto the said *Lewes Stevings*, his heires and assignes for ever: To the onely use, benefitt, and behoofe of the said *Lewes Stevings*, his heires and assignes for evermore. In wittness whereof, I, the said *Robert Isaac*, have hereunto set my hand and seale, the nine and twentyeth day of Aprill, in the fower and twentyeth yeare of the raigne of our souveraigne Lord *Charles* the Second, by the grace of God, of England, Scotland, Fraunce, and Ireland, Kinge, Defender of the Faith, &c. Annoque Domini 1672.

(Signed) *Robert Isaac*," (L.S.)

Endorsed, " Sealed and delivered, p'sence of us,

Robert White, Ralph Perrin, John Tucker."

Dowling then pleaded,—first, that *Robert Isaac* did not give or grant the said purparty of the advowson to *Lewis Stevings*,—secondly, that the deed-poll was made to defraud persons who had purchased, or should thereafter purchase, the said purparty,—that *Robert Isaac*, upon his marriage with *Elizabeth Skiffe*, in 1692, conveyed such purparty to the use of the issue of that marriage in tail,—that *R. Isaac* and his wife died, leaving a daughter,—that in 1714, Sir N. *Hooper* presented in right of the daughter, *or* in right of *R. Isaac*, accruing after the fraudulent deed poll,—the plea then deduced a title to *Dowling*, as issue in tail (*a*).

(*a*) The pleas were originally forty-three; by which *Dowling* put in issue every link of the title, from the deed-poll downwards, and denied the execution of the deeds stated in the declaration, and also the *operation* of the same deeds, in distinct pleas. As *Dowling* was not party or privy to those deeds, the former course appears to have been irregular, *vide* 3 Nev. & Mann. 50 (*e*).

After attacking the title thus in detail, *Dowling* also pleaded "that neither *W. S. Gully*, nor any of his ancestors, nor any person under

The replication joined issue upon the first plea, and took issue upon the allegation in the second plea that the deed-

whom he claimed, after *Robert Isaac* was or were seised of the said property—*without this that* the plaintiffs became or were possessed of the next avoidance and right of presentation on the death of the said *Powell Edwards*, modo et formâ," thus putting the whole title in issue by one sweeping traverse of the legal result of the matters stated in the declaration. In *The Grocers' Company* v. *The Archbishop of Canterbury*, as reported, 3 Wils. 214, 234, *De Grey*, C. J., is stated to have said, "As to the traverse, we think matters of law, or rather matters of right (as this is), resulting from facts, are traversable: whether one obtained a church by simony, is traversable; Rast. Ent. 532; or whether one is seised in fee, or in tail, is traversable; Yelv. 140, *Ewer* v. *Moile*. *It is the common averment in a quare impedit, 'that it belonged to A. B. to present to the church when the same became vacant,' which may, or rather must, depend upon both law and facts, and the same is traversable.*" The words in italics are omitted in the report of the same case in 2 W. Bla. 770, 776, and the judgment of the Court proceeded, not upon the sufficiency of the replication containing the traverse, but upon the insufficiency of the plea. As the Court however goes on, though unnecessarily, to pronounce an opinion in favour of the sufficiency of the replication, it may be desirable to shew the state of the pleadings.

The declaration set forth the following title.

The plaintiffs, being seised in fee of the advowson of Allhallows, Honey Lane, presented *Hutchinson*. The Archbishop of *Canterbury*, being seised in fee of the advowsons of St. Mary-le-Bow and St. Pancras, Soper's Lane, collated *Smallwood* and *Dillingham*. The three churches were destroyed by the Great Fire. By 22 *Car.* 2, (c. 11, s. 63,) it was enacted, that the three parishes should be united, and that Bow Church should be the parish church; that the respective patrons should present by turns to that church only; the first presentation to be made by the patron of the church, the endowments whereof were of the greatest value. By virtue whereof the Archbishop and the plaintiffs became seised of the advowson in fee, and entitled to present to Bow Church. After the statute the church became vacant by the death of *Smallwood*, and the Archbishop collated *Puller*. The church became vacant by the death of *Puller*, and the Archbishop, as in his second turn, collated *Bradford*, who was afterwards created Bishop of *Rochester*, and the church thereby became vacant; whereby King *Geo.* 1, by his prerogative, presented *Lisle*, who was afterwards created Bishop of *St. Asaph*; whereupon King *Geo.* 2 presented *Newton*, who resigned. *By reason whereof it belongs to the plaintiffs in their turn, being the* third *turn, to present*, &c.

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poll was made to defraud persons who had purchased, or should purchase, the said property.

The plea admits the seisin of the advowsons, &c., the presentation and collations before the fire, the burning of the three churches, and the statute of *Car.* 2, and that thereupon the Archbishop and the plaintiffs became seised and entitled to present, and that Bow Church became vacant by the death of *Smallwood;* but says that Bow Church was of greater value than the other two, and that Allhallows, H. L., was of greater value than St. Pancras, S. L.; by reason whereof the Archbishop became entitled to present to Bow Church in the first turn, the plaintiffs in the second, and the Archbishop in the third turn. That true it is that the Archbishop, on the death of *Smallwood*, did in his first turn collate *Puller*, and that the church became vacant by the death of *Puller;* but that thereupon, according to the statute, it belonged to plaintiffs to present in *their second* turn; but that the Archbishop collated *Bradford* by usurpation; that *Bradford*, being in the said church, was created Bishop of *Rochester;* that *Geo.* 1 presented *Lisle;* that *Lisle* was created Bishop of *St. Asaph*, and *Geo.* 2 presented *Newton*, who resigned; by reason whereof it belonged to the Archbishop to present in *his third* turn, and that he collated the defendant *Backhouse.*

Replication: That the church became vacant by the resignation of *Newton*, and it belongs to plaintiffs to present in *their third* turn, yet the defendants hinder them. *Without this that* it belonged to the plaintiffs to present at the *second* turn, when the church became vacant by the death of *Puller*, as alleged in the plea.

Demurrer to the replication, shewing for cause that the plaintiffs have traversed not any matter of fact, but matter of law.

It therefore appears that though the declaration contained the usual allegation that it belonged to the plaintiffs to present, yet no traverse was taken upon that allegation (as, according to the statement in the report in Wilson, the Chief Justice thought might have been done), but that the traverse in question was taken by the plaintiffs upon *their own* title to present in the *second* turn. The argument for the plaintiffs (3 Wils. 229) was, that the question between the parties was, whether the plaintiffs were entitled to the second or to the third turn; that the relative value of the three livings was merely *evidence* of the turns, and that the plaintiffs might possibly have waved the second turn, if it was theirs, and by agreement with the Archbishop have taken the third turn. Neither these reasons, nor the analogies relied upon by the Court, may perhaps be thought quite satisfactory; but as the Court held that the declaration was good and that no title was made out by the plea, the question as to the traverse in the replication became wholly immaterial. Nor could the defendants have raised the question in a court of error without first satisfying the court of error that they

In the rejoinder the defendant joined issue upon the replication to the second plea.

had conveyed a good title to themselves by their plea. The position stated in the judgment of the Lord Chief Justice, as reported by Wilson,—that the common averment in a quare impedit, that it belonged to *A. B.* to present to the church when it became vacant, is traversable,—appears to be at variance with the established *course of pleading* in quare impedit, and against *principle*. The case in Rastall, referred to in the above judgment, was an action of quare impedit, by *W. B.*, against the Bishop of *Salisbury*, for refusing to admit his clerk, *J. L.* The Bishop pleaded that he refused because *J. L.*, ante præsentationem factam obtained the rectory from *W. B.* per simoniam; and the plaintiff replies, quod *J. L.* ante præsentationem factam non obtinuit rectoriam prædictam per simoniam. Here simony was a distinct substantive allegation, not dependent upon any antecedent statement of facts. In *Ewer* v. *Moile* (reported also Cro. El. 771,) the plaintiff declared in waste, upon a seisin in fee, against the defendant, as his lessee for years. The defendant pleaded that he, being seised in fee, conveyed to the plaintiff,—habendum to the plaintiff and his heirs so long as *A. B.* should have issue of his body; that the plaintiff demised to the defendant, and afterwards *A. B.* died without issue of his body. This plea was held bad for not traversing the *unqualified* seisin in fee, upon which the plaintiff had declared. Here, again, the seisin of the plaintiff was a simple, original fact, not founded upon any precedent matter, and which fact would be equally true whether the seisin of the plaintiff were acquired by descent, conveyance, or disseisin. But whether, in the principal case, the plaintiffs below were *possessed* of an expectant presentation, was not a matter of fact, but a mere legal inference from the precedent matter, upon which a jury are not qualified, and cannot be called upon, to decide. *Willion* v. *Berkley*, Plowd. 230 b, 231 a; *Kenicot* v. *Bogan*, Yelverton, 200. Thus, if it be alleged that *A.* was seised in fee, and that *A.*, being so seised, conveyed by lease and release to *B.* and his heirs, whereby *B.* became seised in fee, the adverse party may traverse the seisin of *A.*, that being an allegation of fact; but he cannot traverse the seisin of *B.*, because that seisin is a mere inference of law, resulting from the prior seisin of *A.* and the execution by *A.* of a conveyance capable of passing the fee.

In *Grills* v. *Mannell*, Willes, 378, the avowry stated a conveyance by lease and release from the avowant to the plaintiff and his heirs, in consideration of a rent charge of 7*l.* 10*s.*, by virtue whereof the plaintiff entered and became seised of the premises in his demesne as of fee. The plaintiff pleaded that he never was seised of the premises in his demesne as of fee. Upon demurrer, it was objected that the plea denied what was before (impliedly) admitted, and that the traverse was only of a

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The return then stated the venire and habeas corpora juratorum—the postea, finding both issues for the plaintiffs

consequence of law. *Willes*, C. J., in delivering the judgment of the Court, said, "We are of opinion that the first plea is bad in both these respects; first, because the plaintiff has denied that he was seised in fee by virtue of the lease and release, though he has in effect admitted it before; for in this plea he has not denied, not even by way of protestando, that *Mary Mannell* (the avowant) was seised in fee at the time of making the lease and release; and as he has admitted in this plea that *Mary Mannell* was seised in fee, and that being so seised she made a lease and release to the plaintiff and his heirs, the necessary consequence of that is, that he must be seised in fee by virtue of such lease and release; for I defy any one to put a case where a person seised in fee makes a lease and release to another and his heirs, and yet the grantee shall not be seised in fee; and yet this is the very thing denied by this plea. Secondly, If there could be any doubt of this (but there certainly is none), the only doubt would be, whether this be the necessary consequence in law, that is, whether these deeds of lease and release have this operation in law or not. And it is a certain known rule, never that I know of once controverted, that a man cannot traverse a *consequence of law*; and for this plain reason, because it is a matter of law and not of fact, and therefore not proper to be tried by a jury."

In *Beal* v. *Simpson*, 1 Lord Raym. 408, 410, (see the pleadings, 3 Lord Raym. 314, 1 Lutw. 627,) the same principle was recognized. *Treby*, C. J., differed from the other judges as to the propriety of the traverse upon the virtute cujus in that particular case. This difference in opinion, however, was not as to the general rule of law, but as to its application, the Lord Chief Justice being of opinion that the case fell within the general rule, and the three other judges holding that the virtute cujus in that case did not serve, as in ordinary cases, merely to collect, and draw an inference from, facts previously alleged, but that its operation there was to assert substantively, as a new fact, that the act stated under the virtute cujus was done in assertion of and with reference to the particular authority to which the virtute cujus referred. A similar doubt as to the operation of the virtute cujus in the particular case (and no question as to the general rule) created the difficulty in the recent case of *Lucas* v. *Nockells*, 4 Bingh. 729, 1 Moore & Payne, 783; *S. C.* in dom. proc. 10 Bingh. 157, 3 Moore & Scott, 627, 7 Bligh, New Series, 140. And see *Priddle* and *Napper*'s case, 11 Co. Rep. 10 a, (the dictum in which case upon this point is adopted in Doctr. Plac. 351, and cited and approved in *The Protector* v. *Holt*, Hardr. 70;) *Archbishop of Canterbury*'s case, 2 Co. Rep. 48; *Knightley* and *Spencer*'s case, 1 Leon. 333; *Benton* v. *Trot*, Sir F. Moore, 530, 534; *Clampe* v. *Clampe*, Cro. El. 29; *Foster* v. *Jackson*, Hob. 52;

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below, and that the church was not full and had become void 25th October, 1825, and that the yearly value of the church was 600*l.*, and that the quare impedit was sued out within six months after the avoidance (*a*)—and the judgment of the Court of C. P., (signed 19th November, 1828,) in accordance with the verdict for the plaintiffs below, to recover their presentation against the defendant *G. P. Dowling*, and also their damages (*b*) to the value of the said church for half a year, which, as assessed by the said jurors in manner aforesaid, amount to 300*l.*, as and for the damage sustained by the plaintiffs below, by reason of the said disturbance.

The errors assigned were,

First: That the plaintiffs had not merely stated defectively their title to present, but had shewn a defective title to any separate purparty or fourth part of the advowson, and no title or right in themselves.

Secondly: That the declaration was insufficient.

Thirdly: That there was a material variance between the deed-poll and the statement of it in the declaration.

Fourthly: That the deed-poll does not support the alleged title.

Fifthly. That by the record it appeared that the deed-poll

Calthorpe v. *Heyton*, 2 Mod. 55; *Rex* v. *Blagdon*, cited 2 Stra. 841; *Richardson* v. *Mayor of Orford*, 2 H. Bla. 182; *Hobson* v. *Middleton*, 9 Dowl. & Ryl. 249, 6 Barn. & Cressw. 295; 1 Wms. Saund. 23, n.(5); Ibid. 298, n. (3); Stephens, Plead. 3d ed. 191.

The Court of C. P. reduced the record to its present form, by rescinding the rule to plead several matters, although the declaration had been amended twice, and after the plaintiffs had been erroneously nonsuited. *Vide* 4 Bingh. 525, and 2 Moore & Payne, 105.

(*a*) As to the obligation on the jury, where a verdict is found for the plaintiff, to inquire ex officio whether the church is full—if full, of whose presentation—the annual value of the church—and how long vacant, see *Larke* v. *Kyme*, Keilw. 57 b.

(*b*) By statute Westm. 2, (13 *Edw.* 1, st. 1, c. 5,) if the six months are not past, (and the plaintiff has therefore not lost his presentation,) damages are to be adjudged to the plaintiff to the half-year's value of the church, or as the expression is, to the value of a moiety of the church for a year—ad valorem medietatis ecclesiæ per annum.

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was fraudulent, and void in law as against purchasers, as stated in the plea of the defendant *Dowling*, and that therefore the Court below ought to have given judgment for *Dowling* non obstante veredicto (*a*).

Sixthly: That judgment ought to have been given for the defendant below.

Seventhly: That before the making of the said count or declaration, in the form contained in the said record, in Easter term, 7 *Geo.* 4, the plaintiffs below counted and declared against the defendants below, on the same writ in the plea aforesaid, in another and different form, and upon another and different title to present to the said church, from the form or title set forth in the count or declaration contained in the record now before the Court, as appears by the court rolls of that term, now remaining of record in the Court of the Bench; to which count or declaration so contained in the said court rolls, other and different pleas were pleaded than those contained in the record now before the Court; and that such other proceedings were had on the said pleas so pleaded to the first count or declaration in the Court of Common Pleas, that afterwards, in Hilary term, various issues in fact to be tried by the country and by the record respectively, and also an issue in law on a demurrer to the replication to one of the said last-mentioned pleas, were joined, as appears by the issue-rolls of that term remaining of record in the Court of C. P.; that to try the said last-mentioned issues, a venire issued; that a record of nisi prius was made in the same suit, in order to try the said last-mentioned issues; and that afterwards, on the 21st day of March, at the Castle of Exeter, in the said county, a jury was sworn to try the said last-mentioned issues, but before they had given their verdict, the plaintiffs below being solemnly

(*a*) As the replication does not *confess* the plea, it would seem that there could be no judgment non obstante veredicto, and that supposing the issue taken by the replication to be improper, and not cured by verdict, the Court below ought to have merely awarded a repleader; *Plomer* v. *Ross*, 1 Marsh. 95; 5 Taunt. 386; *ante*, 392, (*a*).

called came not, and were nonsuited at that trial, upon the nisi prius record; which nonsuit was duly entered; and although a nonsuit in quare impedit is by law final, yet by a certain rule of the Court of Common Pleas made in Easter term, 1828, it was erroneously ordered by that Court, that the defendants below should shew cause why the nonsuit entered on the trial of the said cause should not be set aside, and a new trial had between the parties; that afterwards, in Trinity term, 8 *Geo.* 4, by a certain other rule of the Court of C. P., on reading the former rule and hearing counsel, it was erroneously ordered by the same Court, that the nonsuit should be set aside, and a new trial had between the parties; that the said rules did not appear to have been granted on the ground of any irregularity, misconduct, or mistake, or on any affidavit, but on reading the said record of nisi prius and hearing counsel only, as will appear by the said rules when certified to the Court here; that after it had been so ordered by the Court of C. P., that a new trial should be had between the parties, by a certain other rule of the same Court, made on the 22d day of November, in Michaelmas term, 8 *Geo.* 4, it was ordered, that the defendants should, on the second day of Hilary term then next, shew cause why all the pleas in the record should not be struck out, except those which referred to the deed of the 29th April, 1672, or why the plaintiffs should not be at liberty to amend their declaration in the said cause; that the rule was enlarged, and that it was erroneously ordered by the Court of C. P. that the rule for pleading several matters obtained in Michaelmas term, 7 *Geo.* 4, should be vacated, or that the plaintiff should be at liberty to amend the declaration as the Court should direct, upon payment of certain costs (*a*); that the said last-mentioned rules do not appear to have been granted for any irregularity, misconduct or mistake, but only on the supposed grounds therein mentioned, and which will appear by the same rules and affidavits, when certified to the Court here; that by another rule of the said

(*a*) *Vide* 4 Bingh. 525, and 2 Moore & Payne, 105.

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Court of C. P. made in the said cause, it was ordered that the two last-mentioned rules should be discharged, and that without payment of costs.

Eighthly: That by another rule of C. P., it was erroneously ordered, that the defendants below should shew cause why the plaintiffs below should not have leave to amend their declaration, according to several amendments thereof mentioned in the said rule of 1st May, upon payment of certain costs. And by a certain other rule of the Court of C. P., made on the 12th of May, 9 *Geo.* 4, it was erroneously ordered, that the plaintiffs should be at liberty to amend their declaration, as the Court should order and direct, upon payment of certain costs; and that if the said *G. P. Dowling* should be minded and desirous to resign, and would actually resign to the plaintiffs below, and abandon all his right, title and interest to the rectory, and would consent to the plaintiffs below signing judgment, the plaintiffs below should pay to the defendants below, all their costs of and occasioned by their defence, the said *G. P. Dowling* having until the last day of that term, to signify to the Court of C. P. his assent thereto or dissent therefrom.

Ninthly: That by a certain other rule of the Court of C. P., made the 9th of May, 9 *Geo.* 4, it was erroneously ordered, that the plaintiffs below should have leave to amend their declaration, according to certain amendments thereof mentioned in the rules, upon payment of certain costs; and that a rule for the defendants below to plead to such declaration, when amended, should be given; by and under the authority of which erroneous rules, or some or one of them, the plaintiffs below were permitted by the Court of C. P. to amend, alter, and depart from their said first count or declaration, and to count or declare, and did count or declare in the form contained in the said record now before the Court here; and after the declaration was so amended, the same in the said amended form was entered of record in the said Court of C. P.

Tenthly: That after the plaintiffs below had declared as

last aforesaid, it was erroneously ordered by the Court of C. P. that the defendants below should plead to such amended declaration on or before the 23d of May, in the ninth year aforesaid.

Eleventhly: That it was ordered that the plaintiffs below should shew cause why the defendants below should not have leave to plead to the amended declaration, the several matters specified in the rule; that on the 17th of June, it was ordered that the said *G. P. Dowling* should, within three days, elect whether he would plead to the amended declaration, that the deed of the 29th April, 1672, was fraudulent against subsequent purchasers, and a plea of non concessit as to that deed only,—or plead some other single plea alone to the amended declaration; and that he should, within three days, plead either those two pleas, or such other one single plea, as he should elect; and the said rule, as to all the other pleas therein specified was discharged (*a*); that the said *G. P. Dowling*, under the authority of the Court of C. P., and of such rule, and in order to prevent judgment being signed, or incurring contempt by repleading the same pleas, was compelled to plead, and did plead the two pleas contained in the record now before the Court only (*b*).

(*a*) The collateral matters here alleged not being stated in the return to the writ of error, the plaintiffs in error made several applications to this Court and to the Court of Chancery, a statement of which applications will be found *post*, 499, 501, 502.

(*b*) The marginal points submitted to the Court by the plaintiffs in error, were these:

First: That in case of parceners entitled to an advowson in gross, and being married women, disagreement between them to present in the first set of turns, and presentation by the eldest and her husband in her right in the first turn of that set, is not sufficient to sever the inheritance of the advowson, so as to entitle an assignee claiming under the youngest parcener to present separately in the second set of turns, without any disagreement to present jointly in *that set*, or any *partition*, *composition*, or *agreement* between the parceners, or their assigns, to present by turns. *Vide* Mallory *Quare Impedit*, 71, pl. 1, 2; ib. 72; *Anon.* Co. Litt. 166, n. 13.

Secondly: That mere disagreement between the husbands of the parceners and their wives, to present jointly in the first set of turns, could not sever the inheritance of

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Twelfthly: That the several rules for amending the declaration and pleading de novo, amounted in law to the order-

the wives, the latter not being sui juris at the time,—and that nothing but *partition* could effect such severance, which, if it had been made, ought to have been stated in the declaration; and that the imperfect allegation, "that the said *Francis Isaac*, and *Grace* his wife, died so seised of the same one fourth part of the said *Grace* of the said advowson," cannot help the declaration. (5 Bingh. 173; 2 Moore & P. 276.)

Thirdly: That no presentation subsequent to that by the eldest parcener and her husband appearing to have been made *by right*, and all the subsequent ones appearing to have been made *by strangers*, such presentations must be taken to have been made by *usurpation*,—which deprived the plaintiffs below of this possessory remedy by quare impedit, whatever they may have by writ of right of advowson.

Fourthly: That the declaration professing to state, that by the deed-poll of the 27th April, 1672, *Robert Isaac*, in consideration of the sum of 20*s*. and for service done, and other considerations, granted to *Lewis Stevings* the same purparty or fourth part of the advowson in fee, and that deed on the oyer appearing to be a grant by *Robert Isaac*, as patron of the church, for that same sum and those same considerations, of the fee of the whole advowson, the deed does not support the title as set out in the declaration, and the defendant is entitled to judgment on the plea of non concessit.

Fifthly: That the deed of the 29th April, 1672, is on the face of it fraudulent in law and void by the statute of *Eliz.*, (the consideration of 20*s*. being merely *nominal*, and the service not apparently done on any *contract*,) and that no evidence could be admitted to contradict or explain the deed or the consideration of it, as expressed in the instrument; and that the defendant is therefore entitled to judgment non obstante veredicto on the special plea.

Sixthly: That the plea of in nullo est erratum to an assignment of errors out of the body of the record, is a confession of the matters assigned for error, and operates as a demurrer to their legal efficacy, as in the case of an assignment of error in fact; and that the Court of Common Pleas could not legally grant a new trial, and afterwards alter the record, so as to prevent the trial of issues originally joined, without objection either at common law or by any of the statutes of amendment, and that the rules granted in the present case amounted to an improper granting of a repleader.

The points submitted to the Court by the defendants in error were these:

First: The defendants in error mean to insist that a severance of the estate in coparcenary in an advowson, is the necessary consequence of disagreement in presentation, in whatever way that disagreement may have arisen, or by whatever acts it may have been manifested. A severance once made

ing of a repleader, in a case where the awarding of a repleader was altogether unauthorized by law.

by parties having the right at the time, must go on; otherwise the rest will be prejudiced, as also the party presenting in the first turn, or her representatives ultimately.

Secondly: That the act of the husband and wife, seised in right of the wife, binds the wife and her heirs until disagreement to such act.

Thirdly: That since the statute of 7 *Ann.* c. 18, an usurpation is no bar to a quare impedit.

Fourthly: That the plaintiff was bound to plead the deed according to its legal effect, *ante*, 451, (*e*); and that the legal effect of a deed, professing to grant the entirety in consideration of a sum of money, executed by a party who has only one-fourth, is, to pass to the vendee all that the vendor had in the entirety, viz. one fourth; so that a deed purporting to be a grant of *an advowson generally*, executed by a party who appears by the pleadings to be seised of a *purparty* only, enures and is truly pleaded as a grant of that purparty.

Fifthly: It having been found upon the issue, by the verdict upon that record, that *Robert Isaac* granted for the considerations expressed in the deed, and those considerations being valuable in point of law, the grant could not be defeated by a subsequent conveyance in consideration of marriage.

Sixthly: That a plea of in nullo est erratum, even in ordinary cases, only admits such matters of fact as are *properly* pleaded; but in this particular case, where in nullo est erratum was not pleaded until after the alleged erroneous matter of fact had been *disproved* by the non return to the writs of certiorari, the plea of in nullo est erratum would not amount to an admission of the truth in fact of the matters so alleged and not verified.

The Court of C. P. had a right to regulate the course of its own proceedings, and to set aside an improper nonsuit, if it saw it to be reasonable so to do. Such nonsuit, when set aside, is no nonsuit within the statute of Westm. 2, (13 *Edw.* 1, st. 1,) cap. 5, but has become an absolute nullity.

Seventhly: That the sixth and subsequent assignments of error relate to matters not assignable for error.

Eighthly: That the matters so assigned for error form no part of the record.

Ninthly: That the sixth and subsequent supposed errors relate to matters of practice not cognizable by any other authority than that of the Court in which they arise.

Tenthly: That supposing these matters of practice were cognizable in this Court, the several matters alleged as error were perfectly warranted by the course and practice of all the superior Courts.

Eleventhly: That supposing the proceedings in the Court of C. P. had been irregular, such irregularity would have been waived by the plaintiffs in error joining issue and going to trial upon the substituted record.

Twelfthly: That supposing no effectual disagreement and no severance to have taken place, before

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Thirteenthly: That the said rules do not, nor do any of them, authorize any amendment or alteration in or from the court rolls, or issue rolls, or nisi prius record, or any rolls or record of proceedings in the said cause; nor were any such amendments or alterations authorized by law, especially after the cause had been once tried on the said issues in fact, and the new trial ordered, which could only be of the *same* issues of fact before joined and carried down to the said assizes for trial, and contained in the said nisi prius record.

Fourteenthly: That the jury on the last trial gave no verdict, nor has the Court of C. P. given any judgment, upon the several issues originally joined between the said parties, and contained in the said court rolls, issue rolls, and record of nisi prius, whereon the said first trial was so had as aforesaid (*a*). All which before-mentioned rolls, record of

the conveyance from *Robert Isaac* to *Lewis Stevings*, on the 27th April, 1672, that conveyance would enure as a severance of one-fourth part of the coparcenary estate, and the subsequent presentation of *Edward Chichester* in right of *Robert Isaac*'s turn, and the following presentations of three clerks in the turns of the three remaining coparceners, would vest the right to the next turn in the party claiming under *Lewis Stevings*, as tenant in common of the advowson with the three remaining coparceners.

(*a*) The last eight assignments of error appear to be quite a novel experiment, and to admit of several answers:—

First: That these rolls &c. neither are nor can be parcel of the record: That the chief justice and the officers of C. P., to whom the writ of certiorari is prayed to be directed, have no power to certify the matters which they would by such writ be required to certify; as the former pleadings and the former postea are no longer in the legal custody of those persons, and these matters have no legal existence, or they may be taken to be proceedings in another cause between the same parties; *Tyson* v. *Hylyard*, 2 Lord Raym. 1122: That nothing can be certified which will not stand with the record first returned by the Court below, in obedience to the writ of error; *Lloyd* v. *Bethell*, 1 Roll. Rep. 200; *Floyd* v. *Bethell*, 1 Roll. Abr. 764, l. 22, *S. C.* (translated, 9 Vin. Abr. 552); Com. Dig. *tit.* Pleader, (3 B 16).

Secondly: That the Court of C. P. had full authority to make the several rules and orders complained of.

Thirdly: That the power of the Court of C. P. to make such rules and orders must depend upon the practice and course of that court,

nisi prius, writs, panels, posteas, entry of nonsuit, rules, orders, affidavits and proceedings, above mentioned, will appear to the Court here, when duly certified to the said Court.

And hereupon the said *G. P. Dowling* prays the writ of our lord the king to be directed to the Right Hon. Sir *William Draper Best*, Knt., his majesty's chief justice of the Bench at Westminster, to certify to our said lord the king the said court rolls, and issue rolls, now remaining of record in the same Court, before the said chief justice and his companions, justices of the Bench aforesaid, and also to certify to our said lord the king the said record of nisi prius, with the postea, or entry of the said nonsuit, thereon, mentioned in the said rule of the said Court of the Bench, made in Easter term, in the eighth year of the reign aforesaid, together with the writ of venire facias and writs of habeas corpora juratorum, and panels of jurors annexed thereto, and the entry or minute of the said nonsuit, and all other things belonging to the laid last-mentioned record, and the proceedings had thereupon, or otherwise relating to the matters aforesaid, above assigned for error, in his custody or power: and also another writ of our said lord the king, to be directed to *George Watlington*, Esquire, *H. B. Ray*,

of which the Court of King's Bench, as a court of error, has no judicial knowledge, every Court being entitled to regulate its own practice.

Fourthly: That it is not competent to the defendant below to join issue, go down to trial, and take the chance of a verdict, and then say that such issues ought not to have been tried: That by so doing he has assented to all that has been done, and consensus tollit errorem, if error there had been: That though a defendant in error, by pleading in nullo est erratum, admits the facts assigned for error, provided they are not inconsistent with the record, yet where errors are assigned, which are not by law assignable, the defendant in error may either demur to the errors so improperly assigned, and plead in nullo est erratum to the other errors, or may plead in nullo est erratum to the whole, which plea is in the nature of a demurrer, and refers the matter to the judgment of the Court; *Hudson* v. *Banks*, Cro. Jac. 28; *Bowsse* v. *Carrington*, ib. 244; *Haydon* v. *Mynn*, ib. 521; *King* v. *Gosher*, Yelv. 58; *Cole* v. *Greene*, 1 Lev. 311.

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Esquire, and *Thomas Hudson*, Esquire, prothonotaries of the said Court of the Bench, and to *George Griffiths*, Esquire, *Jonathan Hewlett*, Esquire, and *John Henry Cancellor*, Esquire, secondaries of the said Court of the Bench, to certify to our said lord the king the said several rules, and all other rules and orders of the said Court of the Bench in the said cause, and touching or in anywise relating to all or any of the matters aforesaid above assigned for error, together with all affidavits and things relating thereto, affiled of record, in the custody or power of them, or any of them. And such writs respectively are granted to the said *G. P. Dowling*, &c. (*a*).

And he prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, and that a writ to the bishop may be granted to him, &c.

E. Lawes, Serjt., for the plaintiffs in error. Neither the presentation by *Grace Westcott*, in 1674, nor the presentation by Sir *Nicholas Hooper*, in 1714, are connected by the declaration with the title set up by the plaintiffs below.

The second plea states that the presentation by Sir *N. Hooper* was made in right of *R. Isaac's* daughter, or in right of *R. Isaac* himself, through some right derived from him under the execution of the fraudulent deed of 1672. And that statement not being traversed, the plaintiffs below must be taken to have admitted that this was the true character of that presentation. It was therefore adverse to the title of *Stevings*, and a usurpation upon him, supposing him to have been then entitled under the deed of 1672 (*b*). This

(*a*) These writs were taken out in the usual course sub silentio, but the plaintiffs in error were unable to get any return to them. *Vide post*, 501.

(*b*) The plaintiffs below had no opportunity of traversing this statement. To do so, they must either have replied double, or have admitted the allegation that the deed

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is a possessory action, as appears by the statute of Westminster 2 (*a*), which recites, that of advowsons of churches there are but three original writs, one of right and two of *possession*, viz. darrein presentment and *quare impedit*. Though the action is brought in respect of a possessory interest only, yet the plaintiff is bound to shew a *title* to the advowson, or to that turn of the advowson which he claims (*b*). A declaration on a right to present *by turns* to an advowson in gross, must shew a presentation in that turn in which he claims, where that is possible; and also, in such a case as this, the conveyances &c. constituting the title to present in the other turns, must be shewn as at common law. This appears from the language of Lord *Hobart* in *Digby* v. *Fitzherbert* (*c*), Lord Chief Justice *Vaughan* in *Tufton* v. *Temple* (*d*), Lord *Loughborough* in *Thrale* v. *The Bishop of London* (*e*), and also from *Watson's Clergyman's Law*, 245, 267, which is most full in shewing the sort of title which a plaintiff in quare impedit is bound to disclose upon the record. The plaintiff must possess the *same* estate,—it must be the same estate, or parcel of the same estate,—in respect whereof the presentation was made.

The distinction between a defective title and a title defectively set out is admitted (*f*). Here, however, the declaration is bad in substance, because it sets out a title which is equally defective, whether the inheritance be taken to be divided or not, by the non-agreement of the coparceners in the first turn. For assuming that the tenure in coparcenary was severed by the non-agreement, the declaration is insufficient, in not alleging any presentation *by right*, by those under whom the plaintiff derives title in the fourth

of 1672 was fraudulent. The title set out in the second plea was merely in the nature of a *suggestion*, for the purpose of entitling the defendant, *G. P. Dowling*, to a writ to the bishop, in case one of the issues had been found for him.

(*a*) 13 *Edw.* 1, stat. 1, c. 5.
(*b*) Com. Dig. *Pleader*, (3 I 4).
(*c*) Hob. 101.
(*d*) Vaugh. 7 & 8.
(*e*) 1 H. Bla. 409.
(*f*) Vide *Crowder* v. *Oldfield*, 1 Salk. 365, 2 Lord Raym. 1225.

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turn in which he claims, or any conveyance or descent under which any of the six previous presentations were made. In *Shireburne* v. *Hitch* (*a*), the plaintiff claimed the second turn, but in his declaration did not lay any presentation in the second turn. He also admitted a title in the defendant to the first turn, but did not set out the mesne conveyances to the defendant. The declaration in that case, (the decision in which gave rise to the statute of *Anne* (*b*),) was held to be insufficient, because it set up a title to present in the second turn, and shewed no presentation in that turn. [*Parke* J. That case is distinguishable from the present, on two grounds: no presentation by the ancestor was alleged, nor a presentation by any person who claimed title to the advowson in such a way as that the Court could take notice of it. The declaration averred a presentation by a person whose title was not shewn. No seisin by actual presentation was alleged. Here, both are found; the common ancestor is stated to have presented, (which presentation is analogous to seisin by taking the esplees in a real action,) and after the non-agreement the first coparcener presented.] The ground of the decision in *Shireburne* v. *Hitch* was stated to be, that the declaration contained no allegation that any person entitled to the advowson had presented. But seisin of the manor is equivalent to a presentation. [*Bayley*, J. Seisin of the manor, without actual presentation, would not be sufficient.] Seisin of an advowson appendant to a manor may be gained by obtaining seisin of the manor; but an advowson in gross, as here, cannot be acquired without that which is an actual seisin, viz., presentation; per Lord *Hardwicke*, in *Rex* v. *Bishop of Landaff* (*c*). In *Hargrave*'s note to *Co. Litt.* 15 b, it is said, that seisin of a manor is a good seisin of an advowson, common, &c. [*Bayley*, J. If appendant or appurtenant.] The Year Book, 18 *Hen.* 6, and *Hale*'s MSS. are there referred to; and in *Watson*, 130, it is said, that an advowson

(*a*) 1 Bro. Parl. Ca. 2d edit. 110; *post*, 481, 489, 492.

(*b*) 7 *Ann.* cap. 18.

(*c*) 2 Stra. 1012.

may be regained, after usurpation, by re-entry into the land to which it is appendant. There can be no possessio fratris of an advowson in gross. In *Shireburne* v. *Hitch* (*a*), although no presentation was alleged to the whole advowson, it was stated that *R. N.* and his wife were seised of the manor and advowson to which &c.; and that was equivalent to the statement of *R. Roberts*'s presentation in this case. Secondly, in that case *partition* was alleged. But though the advowson became an advowson in gross, that was held not sufficient to create a severance of the inheritance. Thirdly, presentation in the first turn was alleged, and that a presentation by right. Here, there is no such allegation. In that case it did not appear that any opportunity had occurred of presenting in the second turn, which turn the plaintiff claimed. Here, an opportunity had occurred, to present in the fourth turn. Independently of the decision in *Shireburne* v. *Hitch*, this declaration would have been bad for want of an allegation of seisin; for a presentation, in a case of an advowson in gross, is as essential as possession is in an action of trespass, since, in the case of an advowson in gross, there can be no seisin or possession, but by presentation. *Rex* v. *Bishop of Landaff* (*b*) shews, that the want of an allegation of a presentation is error, unless the plaintiff declare on the seisin of the crown (*c*). Here, the several presentations alleged negative any presentation in the right of the plaintiffs below in the fourth turn, and shew that *J. Stevings* and his devisees could acquire no seisin. [*Bayley*, J. Put it as *seven* usurpations—what then?] The usurpations before the statute are not cured. [*Bayley*, J. These would be usurpations *on parceners*. If there be four parceners, and a stranger presents in the third turn, that does not affect the right of the fourth parcener to present when his turn arrives; *Thrale*

(*a*) 1 Bro. P. C. 2d ed. 110.

(*b*) 2 Stra. 1006, 1012; *S. C.* 2 Barnard. B. R. 72, 189, 371.

(*c*) As to the effect of the presumption in favour of the crown, in giving to the crown in that very case a title which it never possessed, *vide ante*, vol. i. 286, n.

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v. *Bishop of London* (*a*).] The declaration is bad, inasmuch as these presentations must be taken to have been made by usurpation, and thus to have created a seisin in the usurper. [*Bayley*, J. referred to 2 *Inst.* 365 (*b*), and 2 *Roll. Abr.* 346, (G),(*c*).] The 7 *Anne*, c. 18, was passed to obviate the inconvenience of requiring an allegation of title, and may be considered as a legislative recognition of the authority of *Shireburne* v. *Hitch*. By that statute it is enacted, "that no usurpation upon any avoidance in any church, shall displace the estate of any person entitled to the advowson or patronage thereof, or turn it to a right, but he or she that would have had a right if no usurpation had been, may present, or maintain his or her quare impedit, upon the next or any other avoidance; and if coparceners, joint-tenants, or tenants in common be seised of any estate of inheritance in the advowson of any church, &c., or other ecclesiastical promotion, and a partition is or shall be made between them to present by turns, every one shall be taken and adjudged to be seised of his or her separate part of the advowson, to present in his or her turn; as if there be two and they make such partition, each shall be said to be seised, the one of the one moiety to present in the first turn, the other of the other moiety to present in the second turn; in like manner if there be three, four, or more, every one shall be said to be seised of his or her part, and to present in his or her turn." As the plaintiffs have not the estate of *R. Roberts*, his presentation, on the death of his clerk, ceased to operate. Supposing the possession to have been severed for the first set of turns, it cannot be inferred that the parceners did not agree afterwards to present jointly. [*Bayley*, J. No joint presentation took place in the *fifth* turn. Lord *Tenterden*, C. J. Is there any authority in the books for saying, that after a disagreement and severance the parceners may present jointly.] Upon all the authorities it is necessary to state disagreement for each set of turns.

(*a*) 1 H. Bla. 376.
(*b*) *Post*, 487.
(*c*) Translated, 17 Vin. Abr. 325.

Supposing that *John Stevings*, or his grantee, were entitled, he might have presented in the fourth turn, and the plaintiff might have claimed the title by it; *Countess of Northumberland's* case (*a*). This was not done, and *John Stevings* had no actual seisin, but a mere *right* (*b*). He could not therefore *devise* it; for a mere *right* cannot be the subject of conveyance, or pass by will; but it descends, and the title is to be made under the heir at law; per Lord *Eldon*, in *Attorney-General* v. *Bishop of Litchfield* (*c*). [*Bayley*, J. Then where there has been one usurpation upon a single presentation, the patron cannot afterwards convey his interest. The statute of *Anne* says, that no usurpation shall displace the estate, or turn it to a right. *Littledale*, J. In *Co. Lit.* 166 b, it is said, "If there be divers coparceners of an advowson, and they cannot agree to present, the law doth give the first presentation to the eldest; and the privilege shall descend to her issue; nay, her assignee (*d*) shall have it."] A party cannot convey a mere chose in action; *Goodright* v. *Forrester* (*e*). [*Bayley*, J. In *Barker* v. *Bishop of London* (*f*) there was a usurpation upon the first avoidance, the third daughter devised, and the devisee presented (*g*):—that was an advowson in gross.] *Doe* d. *Lidgbird* v. *Lawson* (*h*). There it was decided, on the authority of previous cases, that an advowson would not descend in a new family without a seisin, and the 3 *H.* 7, fo. 5, pl. 19, was referred to, as shewing that there could be no possessio fratris. [*Bayley*, J. There must be a taking of the esplees. One coparcener cannot know what is done with the others' shares, and therefore cannot know whether the presentations are rightful or wrongful.] That was urged in *Sherborne* v. *Hitch*. [Lord *Tenterden*, C. J. There it was not

(*a*) 5 Co. Rep. 98.
(*b*) *i. e.* a right of *action*.
(*c*) 5 Ves. 831.
(*d*) Vide *Buller* v. *Bishop of Exeter*, 1 Vez. sen. 340.
(*e*) 8 East, 552.
(*f*) Willes, 695; 1 H. Bla. 412.
(*g*) But the devisee who presented, (or rather who recovered in that quare impedit,) was entitled also to the second turn *by descent*.
(*h*) *Ante*, iii. 114, *Doe* d. *Lidgbird* v. *Best*, 8 Barn. & Cressw. 606.

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shewn how the presentation was made; a coparcener would know that she had no right to present until her turn came; she would know how the right originally vested, but she cannot be required to know how the presentations were made in the other turns. Lex neminem cogit ad impossibilia.] The coparceners are privies in estate. [*Bayley*, J. One coparcener does not claim *under* the others (*a*).]

The second objection is, that the declaration does not state any conveyances by which any presentation, subsequent to that of the eldest coparcener in the first turn was made, or even that the subsequent presentations were made by title at all. To entitle the plaintiffs below to avail themselves of the provisions of 7 *Ann.* c. 18, it would be necessary to shew seisin; *Birch* v. *Bishop of Litchfield* (*b*). And if the declaration be not upon the statute, it must be framed agreeably to the principle of the common law. All the precedents deduce a title to each turn. *Tufton* v. *Temple* (*c*), *Thrale* v. *Bishop of London* (*d*), *Barker* v. *Bishop of London* (*e*), *Birch* v. *Bishop of Litchfield* (*f*). This is necessary upon two grounds; the plaintiffs below are privies in estate with the parties entitled in the preceding turns; and it was necessary to negative usurpation before the statute of *Anne*; secondly, the present claim is in the second round of turns, and the declaration, instead of pursuing the form given by the statute, shews two such usurpations without any subsequent presentation; and thirdly, the mere fact of presentation, without shewing in what right, is a matter wholly indifferent, as, for any thing that appears, it may be founded upon a title in the defendants (*g*).

But supposing non-agreement to present jointly to enure as a composition to present by turns, a third objection to the declaration is, that the presentations in the second and

(*a*) Sed vide *Doe* d. *Strode* v. *Seaton*, 4 Nev. & Mann. 81, as to claiming *through*, but not *under*.
(*b*) 3 Bos. & Pul. 444.
(*c*) Vaugh. 7 & 8.
(*d*) 1 H. Bla. 376.
(*e*) Ibid. 412; Willes, 659.
(*f*) 3 Bos. & Pull. 444.
(*g*) Hob. 102; Mallory, Q. I. 200; Vaughan, 57, S. P.

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third turns being usurpations, all the parceners were put out of possession. [Lord *Tenterden*, C. J. The allegation is, that the presentations were "as in the second and third turns."] It is like shewing possession in another in trespass; *Anon.* 2 Ventr. 39; Watson, 124; Degge, 19. Composition would not have severed the estate; *Fitz. Abr.* 54, pl. 196; ib. *tit.* Darrein Presentment, pl. 11. Usurpation on a grantee of the first of two avoidances is a usurpation of the second, and reduces it to a right of action; *Ellis* v. *Taylor* (*a*); and on tenants in common, turns their right of entry to a right of action; *Co. Litt.* 198 a. At common law, usurpation operates more strongly upon the seisin of an advowson, than disseisin upon the seisin of land. The provisions of 7 *Anne*, c. 18, are not retrospective, and do not affect usurpations *then existing; Duke of Dorset* v. *Sir Thomas Wilson* (*b*). These usurpations prevented any subsequent title being acquired by purchase from *John Stevings; Watson*, 125, 129; as there can be no conveyance of the possessory right after a usurpation; *Leak* v. *Bishop of Coventry* (*c*). After a usurpation the fee is in the usurper, and any conveyance must be pleaded as a grant of the *right*. In quare impedit, a presentation by usurpation is a sufficient title; 16 *H.* 7, 8 (*d*); *Show. P. C.* 213. If the declaration is good, the plea is good. [Lord *Tenterden*, C. J. But the plea is found *against* you. *Parke*, J. Have you any authority to shew that the right of presenting in the subsequent turns does not go on, notwithstanding a usurpation upon a prior turn?] *Co. Litt.* 18 a (*e*). [*Littledale*, J. It stands

(*a*) 2 Roll. Abr. 373, pl. 11; translated 17 Vin. Abr. 405.

(*b*) Cited 5 Ves. 828.

(*c*) Cro. El. 811. But in that case it was held, that a usurpation upon one tenant in common should not prejudice his companion; as against whom this was to be considered as a *serving* of the turn, although it was not and could not be alleged that the presentation was *in right* of the turn; *Sir William Elvis* v. *The Archbishop of York*, Hob. 322.

(*d*) *Margaret, Countess of Richmond* v. *The Dean of Windsor*, T. 16 *H.* 7, fo. 7, 8, pl. 11.

(*e*) "But if there be two coparceners, and they agree to present by turn, each of them in truth has

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upon the same ground as if, instead of a disagreement to present, there had been a *partition* of the advowson.] *Bishop of Salisbury* v. *Phillips* (*a*) was the case of an *agreement* to present by turns. [*Bayley*, J. In 2 *Inst.* 364, disagreement to present jointly is put upon the same footing as an agreement to present by turns. Have you any authority that where three coparceners *agree* to present by turns, usurpation upon one turn shall be deemed usurpation upon the subsequent turns?] Here, the plaintiffs are not coparceners. [*Bayley*, J. They are assigns of a coparcener.]

The fourth objection is, that the declaration does not allege any non-agreement to present jointly upon the first vacancy occurring in the second round of turns, and presentation by the eldest sister in the first turn of that round, could not affect the subsequent turns in that round, or sever the inheritance of coparceners who were not sui juris. The allegation that *Francis Isaac*, and *Grace* his wife, died so seised *of the same one fourth part* of the said *Grace* of the advowson, is bad even after verdict. The authority of the dictum in *Keilw.* 49, to the contrary, has been since disputed. *Co. Litt.* 166 n. 2. An advowson is entire. Ib. 164 b, 169 a; *Mirror*, 107; 2 *Roll. Abr.* Partition, (B), pl. 1 (*b*); 2 *Inst.* 365; *Corbet's* case (*c*); *Harris* v. *Nichols* (*d*). [*Bayley*, J. It was not necessary to prove non-agreement.]

Then as to the principal question. The deed must fail on the face of it: This is a *voluntary* deed. [Lord *Tenterden*, C. J. The jury have found that the deed was not fraudulent.] Upon this plea, as it is framed, the allegation of fraud and covin raised a question of *law* only; *White* v. *Hussey* (*e*), *Doe* d. *Ottley* v. *Manning* (*f*), *Pulvertoft* v. *Pul-*

but a moiety of the church; but for that there is but one incumbent, if either of them be disturbed, she shall have a quare impedit &c. præsentare idoneam personam ad *ecclesiam*; for that there is but one church and one incumbent."

(*a*) 1 Salk. 43; Carth. 505.
(*b*) Translated, 16 Vin. Abr. 19.
(*c*) 1 Co. Rep. 87.
(*d*) 1 Anders. 63, cited, Cro. Eliz. 19.
(*e*) Prec. in Ch. 14.
(*f*) 9 East, 59.

vertoft (*a*), *Doe* v. *Routledge* (*b*). [*Bayley*, J. How can it be contended that as a point of law, "services,—20*s*.,—and other good and valuable considerations," could not form a sufficient consideration for this deed of grant. It would be competent to the plaintiff to shew by evidence what those other considerations were.] There were no other considerations. [*Bayley*, J. That should have been pleaded. *Parke*, J. After verdict, they will be presumed.] There can be no distinction made between a consideration of 20*s*. and a consideration of 5*s*., both are merely nominal. [Lord *Tenterden*, C. J. This was a conveyance of the third turn after the subsisting incumbency. Can we, at this distance of time, say, that the consideration for the sale of this remote interest was *necessarily* insufficient?] The jury have only found that there was no fraud *in fact*. [*Bayley*, J. This grant would be fraudulent as against the second deed, if there were no valuable consideration.] *Hill* v. *Bishop of Exeter* (*c*). It was a mere question of construction. [*Bayley* J. In *Hill* v. *Bishop of Exeter*, the deed purported to have been given in consideration of *natural love and affection;* and it was admitted on the pleadings that there was no other consideration except those which were on the face of the deed. That was a *good* but not a *valuable* consideration. *Parke*, J. Here, the jury have found that there was a *valuable* consideration. Here, too, the consideration of the conveyance is stated in the deed to be for *services* performed.] The services would not constitute a valuable consideration, unless they are shewn to have been such as the party was bound to *pay for*. [*Parke*, J. Suppose 50*l*. to have been then due for services. *Bayley*, J. Can we say that the master was not bound to pay his steward for his services?] *Vernon*'s case, 5th Resolution (*d*).

(*a*) 18 Ves. 84.

(*b*) Cowp. 705. See *Jackson* v. *Ham*, 15 Johns. (American) Rep. 263; *Jackson* v. *Garnsey*, 16 Johns. Rep. 189. See also *Sterry* v. *Arden*, 1 Johns. Chanc. Rep. 261, in which the leading English cases are remarked upon by *Kent*, C.

(*c*) 2 Taunt. 69.

(*d*) 4 Co. Rep. 3 a.

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Then as to the errors assigned dehors the record returned here by the Court of Common Pleas. Matters contained in collateral records are specially assigned for error. The defendant, by pleading in nullo est erratum, instead of denying those records by pleading nuls tiels records, admits their existence, and refers it to the consideration of the court of error whether the existence of those records makes the principal record erroneous; *Rex* v. *Andrews* (*a*). [*Bayley*, J. There the trial was without authority.] The question whether the Court below was authorized, either at common law or by statute, to amend the declaration, or to strike out pleas, or to grant a new trial, after a nonsuit, was a question of *law*. At common law, amendments could only be made during the same term; and though under 4 *Ann.* c. 16 (*b*), the Court has a right to grant or refuse leave to plead particular pleas, yet where leave to plead such pleas has been obtained, and issue has been joined on those pleas, the Court is functus officio under the statute, and without power to vacate that rule (*c*). [Lord *Tenterden*, C. J. I feel great pleasure in reading the report of the proceedings in the Court of Common Pleas (*d*). It was a most wholesome exercise of authority.] But in quare impedit, the Court has no *power* to grant a new trial after a nonsuit; a nonsuit being *peremptory* by the statute (*e*). [Lord *Tenterden*, C. J. So it is while it stands; and the *party* can bring no other action; but it does not follow that the *Court* may not, as in the case of a *verdict*, in furtherance of justice, set aside the nonsuit, and grant a new trial.]

(*a*) Yelv. 57.

(*b*) Sect. 4.

(*c*) As to the jurisdiction of the Courts over the costs of such pleas, where some are found for the plaintiff and some for the defendant, *vide Spencer* v. *Hamerton*, 6 Nev. & Mann. 22. That the judge at nisi prius, where one issue, which decides the whole action, has been found, may, of his own authority and independently of any consent of parties, discharge the jury from inquiring into the other issues, *vide* ibid. 25 (*a*), 26.

(*d*) *Gully* v. *Bishop of Exeter* and *Dowling*, 4 Bingh. 525; 2 Moore & Payne, 105, *S. C.*

(*e*) Westm. 2, (13 *Edw.* 1, st. 1,) c. 5.

Manning, contrà, was stopped by the Court (*a*).

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Lord TENTERDEN, C. J.—I am clearly of opinion that this judgment ought to be affirmed. I believe this to be the first time in which a court of error has been asked to reverse a judgment, on the ground that the Court below has made rules which ought not to have been made. It is competent to every superior Court to grant a rule for a new trial. Whether in this particular case such a rule was granted on sufficient grounds or not, is a matter into which we cannot inquire. It must be assumed that sufficient grounds were laid before the Court of Common Pleas for granting a new trial. So with respect to the rules for amending the declaration, and for vacating the rule to plead several matters, and imposing upon the defendant the terms of not pleading more than two pleas (*b*). The course adopted by the Court of Common Pleas, has given me very great satisfaction. The defendants below had pleaded thirty pleas, which were quite beside the merits of the case. Here, both parties claimed under *Robert Isaac*, and the real question between them was, whether the first or the second conveyance made by that person was valid.

In support of the objections to the declaration, it is said that the plaintiffs below did not shew a title to present in the turn now claimed,—that they ought to have shewn a presentation *in that turn* by themselves, or in those under whom they claim. *Shireburne* v. *Hitch* (*c*) was cited in support of this objection. In that case the declaration alleged no presentation by any person under whom the plaintiff claimed. Here, the declaration contains a distinct allegation that *Richard Roberts*, under whom both parties claimed, was seised and presented. That presentation by him was quite sufficient. It is impossible for the person claiming in the second turn to shew presentation in the first turn by

(*a*) The arguments intended to have been used for the defendants in error, may be collected from the points stated *ante*, 470, n., 472, n.

(*b*) *Vide post*, 499, 500.

(*c*) *Ante*, 480, 481.

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himself. It is sufficient for him to shew seisin and presentation in a party under whom he claims.

Another objection to the declaration was this,—that there had been no *severance* of the interests of the coparceners, it appearing only that the sisters *did not agree* to present on the first vacancy, whereupon the eldest sister presented, and that between that presentation in the first turn and the vacancy at which it would be the turn of the fourth sister to present, two usurpations intervened; the effect of which was to convert the estate of the party who claimed to present on the fourth turn, into a mere right, and therefore a *possessory* action was no longer maintainable. I do not think it necessary to inquire whether a usurpation would, under these circumstances, have had that effect, for here it does not appear that any usurpation took place. We are not to presume a *wrong*. The declaration states that one *Grace Westcott*, afterwards, *as in the second turn, which was of the said Jane Squire*, on the 11th July, 1674, presented to the said church, so being vacant, one *Thomas Westcott*, her clerk, who, upon such presentation, was admitted, instituted, and inducted into the same. If that presentation was *by usurpation*, and the effect of such usurpation was as contended, it was for the defendant below to prove the usurpation (*a*). The declaration then states a presentation as in the third turn, in similar terms. With respect to the first presentation in the fourth turn,—taking place after the conveyance by *Robert Isaac*, under whom the plaintiff claims, it is alleged that one Sir *Nicholas Hooper*, on the 8th of November, 1714, *as in the fourth turn, which was of the said Grace Isaac*, presented to the church, so being vacant, one *Edward Chichester*, as his the said Sir *Nicholas Hooper's* clerk, who upon such presentation was admitted &c. Supposing that to have been a presentation by usurpation, yet it being after the 7 *Anne*, c. 18, such usurpation would not affect the title.

(*a*) To let in such evidence, the usurpation should have been pleaded. But such a plea, if good, would have been equally fatal to the title of *G. P. Dowling*, under the marriage settlement of 1692.

Another objection is, that the plaintiffs below have not shewn the presentation of the other sisters, in the first and second set of turns, to have been made by persons having a right to present. That objection would amount to this,—that a party claiming the fourth turn could not recover unless those persons who presented in the second and third turns, presented by good title, although it is not to be supposed that he can have any knowledge whatever of the state of their title; and it would therefore require him to shew their title, which, according to all human probability, he would be unable to do.

The main point in the case relates to the operation of the two deeds. The conveyance by *Robert Isaac* to *Lewis Stevings*, is in consideration of 20*s.* by *Lewis Stevings* paid, and for true and faithful service done unto *Isaac*, and also for divers other good and valuable causes and considerations. To this there are two pleas: one is, that *Isaac* did not grant, &c.: the second is, that twenty years afterwards, *Isaac* being about to marry, executed a deed of settlement, by which he conveyed the fourth turn for the benefit of his wife and children. And the plea alleges that the conveyance by *Isaac* to *Lewis Stevings* was a fraudulent conveyance, and void. The issues joined on both these pleas were found against the party pleading them. But it is said that the jury only found that there was no fraud *in fact*, and that here, on the face of the conveyance, there is fraud in law; that the Court, looking at the terms of the conveyance and the considerations therein mentioned, *must* see that it was a voluntary conveyance, and consequently void; that is, we must *of necessity* see that the conveyance in 1672, of a fourth part of the advowson,—the turn of presentation not being to take effect until after three incumbencies,—was void,—that the sum of 20*s.*, and the services performed, *could* not be a sufficient valuable consideration. The distinction between *good* and *valuable* consideration is this, that a *good* consideration means a consideration good as between the parties;

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but a *valuable* consideration makes the conveyance good against a subsequent purchaser. Without relying on the words, "other good and valuable causes and considerations," I am not prepared to say that the sum of 20s., and the service performed, were not in themselves a sufficient valuable consideration for a right such as this (*a*), which, according to the probable duration of human life, could not come to be exercised for more than half a century (*b*). That being so, and the jury having *found* that the deed was *not* fraudulent, I think we cannot say that it is so.

BAYLEY, J.—I agree that a quare impedit is a possessory action, and that a presentation must be shewn. Here, we have the presentation by *Richard Roberts*, the common ancestor; and I think that it would have been sufficient to state the presentation made by the eldest sister, without shewing the presentation by *Roberts*, because if *Roberts* was seised in fee, but had no possession, and the advowson had descended from him to his four daughters, the presentation by the eldest would have vested the right in all (*c*); which distinguishes this case from *Shireburne* v. *Hitch*. It has

(*a*) Acc. per *Gaselee*, J., 5 Bingh. 175.

(*b*) The price at which *W. S. Gully*, in 1814, bought the presentation at the then next avoidance, was 3000*l.*, of which 2000*l.* was paid down, and 1000*l.* was covenanted to be paid upon the induction of the presentee of the purchaser. The church became vacant in 1825; the induction took place in 1830. Nothing of this, however, appeared on the record; for though profert was made of the deed of grant of 1814, no oyer was craved of it; and though, as the pleadings originally stood, the defendant *G. P. Dowling* stated, in his 30th plea, that the deed of 1814 was not the deed of *Joseph Davie*, and in his 31st plea that *Joseph Davie* did not grant by the deed, (*vide ante*, 464, n.) upon which pleas issues were joined, the plaintiffs were nonsuited before they came to that part of their case, and upon the second trial the grant from *Joseph Davie* to *W. S. Gully* was admitted by the defendants' pleas being restricted to the deed of 1672. All that the court of error could know on the subject of value therefore would be, that 600*l.* had been found by the jury to be the annual value in 1825. *Ante*, 469.

(*c*) *Sed vide post*, 496.

been insisted that the right of presentation was destroyed, or its continuity interrupted, by two usurpations which took place in 1674. In the first place, we are not at liberty to say that there has been any usurpation. When coparceners present separately, a separate right accrues to each coparcener, in her own respective turn, and they become to a certain degree strangers. The fourth coparcener may not know in what right persons have presented to the second or third turn. That is a matter with which she, who is entitled in the fourth turn only, has no concern. It cannot affect her.

I agree that the 7 *Anne*, c. 18, is not retrospective; but in order to ascertain whether the presentation in 1674 was a presentation by usurpation, (and if it was so, the fact ought to have been pleaded (*a*),) that would displace the other coparceners, I must look to the authorities. Lord *Coke* says (*b*), "By the common law, if an advowson descend to divers coparceners, if they cannot agree to present, the eldest sister shall have the first turn, and the second the second turn, et sic de cæteris, every one in turn according to seniority; and this privilege extends not only to their heirs, but to the several assignees, whether he hath (*c*) the estate of them by conveyance, or by act in law, as tenant by the curtesy, he shall have the same privilege by presenting in turn as the sisters had. Therefore albeit the coparceners do make composition to present by turn, this being no more than the law doth appoint, expressio eorum quæ tacite insunt nihil operatur; therefore they remain coparceners of the advowson, and the inheritance of the advowson is not divided; and notwithstanding the composition they may join in a quare impedit, *if any stranger usurps in the turn of any of them;* and the sole presentation out of her turn did not put her sister out of possession in respect of the privity of estate, no more than if one coparcener taketh the whole of the profits. If one joint-tenant present alone, this doth not put the other out of possession, in respect of the unity of the title; but the ordi-

(*a*) *Vide ante*, 485 (*n*). (*b*) 2 Inst. 365. (*c*) i. e. they have.

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nary might have refused his presentee, as he might the presentee of one tenant in common, in respect of some varying opinions in old books; therefore this act doth declare the law, as here it appeareth. This law doth extend to usurpations by one coparcener upon another, as well before partition as after." This was considered as the rule of law in *Barker* v. *The Bishop of London* (*a*).

Before 1709, (in which year the statute of *Anne* took effect,) nothing had occurred capable of affecting the right of the fourth coparcener. The vacancy in that coparcener's turn did not arise till 1714. The statute was then in full operation, and it seems clearly to apply to the present case. The language of the statute is "that no usurpation upon any avoidance in any church, vicarage, or other ecclesiastical promotion, shall displace the estate or interest of any person entitled to the advowson or patronage thereof, or turn it to a right; but he or she that would have had a right if no usurpation had been, may present, or maintain his or her quare impedit, upon the next or any other avoidance, if disturbed, notwithstanding such usurpation; and if *coparceners* or joint-tenants or tenants in common be seised of any estate of inheritance in the advowson of any church &c., and a partition is or shall be made between them to present by turns, that thereupon every one shall be taken and adjudged to be seised of his or her separate part of the advowson to present in his or her turn." If, therefore, at the fourth turn, when a vacancy occurred, there was a usurpation on the turn claimed by the plaintiff, that would not *displace* the estate or interest, or turn it to a right, but would leave it as it was, except with reference to that turn; and when a fourth turn again occurred, the party entitled in that turn might exercise his right of presentation. In this case the period at which that fourth turn again occurs has now arrived. The plaintiffs below therefore have shewn a possession by presentation in the person under whom they

(*a*) Willes, 659, and 1 H. Bla. 412.

claim; because although there should have been one usurpation upon the fourth turn, the right as to future turns was protected by the statute of *Anne*.

Another point made is,—that the deed-poll of 1672 is, *as matter of law*, fraudulent and void. This deed purports to be a grant in consideration of 20*s*. and of faithful service performed, and of divers other good and valuable causes and considerations; and *Filmer* v. *Gott* (*a*) is an authority for saying that in such a case a party is entitled to shew, as matter of fact, the existence of *other* considerations besides those which are expressed in the deed. The defendant below pleaded that this was a fraudulent deed; and if there were no consideration for it,—if the 20*s*. was not paid, and no services were rendered, and there were no other considerations of a valuable nature,—the deed would be fraudulent; but the jury having found that the deed was *not* fraudulent, we cannot, *as matter of law*, say that it is fraudulent.

LITTLEDALE, J.—The plaintiffs below have clearly shewn a title, by descent and by conveyance, to the undivided fourth part of this advowson, in the party who granted the next presentation to their testator; and the question is, whether they, being grantees under the owner of that undivided fourth part, can maintain quare impedit.

It is first objected that the declaration contains no allegation of a presentation in the fourth turn; but I apprehend

(*a*) Brown, P. C. 1st edition, vol. vii. 70; 2d edition, vol. iv. 230.

Whatever is wanting to shew what the consideration is, and from whom it moves, may be supplied by evidence dehors the deed, provided such evidence does not contradict the deed; *Hartopp* v. *Hartopp*, 17 Ves. 183, 192; *Peacock* v. *Monk*, 2 Ves. sen. 128. Thus, where a conveyance purports to be made "in consideration of esteem for *A*., *and for divers other good causes and considerations*," it may be shewn that the deed was executed in consideration of an intended marriage; *Tull* v. *Parlett*, Mood. & Malk. 472. And see *Rex* v. *Scammonden*, 3 T. R. 474.

But where one consideration only is mentioned, and it is not said also "and for other considerations," no other consideration can be shewn.

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that it is quite sufficient to shew a presentation by the owner of the entire advowson. In *Comyns's Digest*, tit. *Pleader*, (3 I 5.) it is laid down, that "the plaintiff in quare impedit ought always to allege a presentment by himself or ancestor, or some other under whom he claims (*a*);" and afterwards, "and regularly a presentment ought to be alleged to have been by him who has the inheritance (*b*)." In the case there cited the plaintiffs declared as coheirs of Lord *Latimer*, "and it was moved that the declaration was insufficient; for the plaintiffs in their declaration entitled themselves,—that Lord *Latimer* was seised of the advowson in fee, and granted the next avoidance to *Dean Carew*, and afterwards the church being void, *Dean Carew presented*." It would have been, no doubt, sufficient to lay a presentation in Lord *Latimer;* but the allegation was held sufficient, because the presentation was shewn to be in the right and title of the grantor. Suppose a quare impedit brought in 1714, after the third presentation, for the *first* turn of the fourth coparcener, I know no other way in which presentation *could* have been alleged than in the person who had been once seised of the entirety (*c*). It would have been clearly sufficient for the owner of the fourth part to shew that the owner of the fee had presented, and that the other coparceners had presented in their turns. That does not differ from the present case. But it is said that there have been several usurpations, and that the plaintiff, therefore, has now a *mere right*. With regard to the second and third presentations,—which were in 1674,—it does not appear that they were usurpations,—that they were not made by persons regularly entitled as coparceners; and although not by the coparceners themselves, they may have been made by persons claiming under them; and if the defendant had meant to

(*a*) Citing Vaughan, 17, (*Tufton* v. *Temple*,) and 57, (*Rex* v. *Bishop of Worcester*).

(*b*) Citing the *Countess of Northumberland*'s case, 5 Co. Rep. 97 b; also reported in Cro. El. 518, Sir F. Moore, 455, 2 Anders. 48.

(*c*) *Vide ante*, 492.

insist that the persons who made the second and third presentations had no right, he ought to have alleged that those presentations were made by usurpation, upon which allegations the plaintiff might have taken issue. It seems to me quite clear upon this record, that *these* presentations cannot be treated as usurpations.

The presentation in the fourth turn was after the statute of *Anne*.

The question then is, whether the grant contained in the deed-poll of 1672, is to be considered fraudulent and void as against purchasers. That grant purports to be made in consideration of a nominal (*a*) sum of money, and also in consideration of service and for divers other good and valuable considerations. The defendant did not demur on the ground that these considerations were not stated. The matter went to a jury, who found that the deed was made for a good and valuable consideration. That finding cannot now be questioned. I think, therefore, that the judgment ought to be affirmed.

PARKE J.—This appears to me to be a very clear case. Numerous objections have been taken to the form of the declaration, which resolve themselves ultimately into very few.

The first objection is, that the declaration contains no allegation that any one presented in right of the fourth turn; and much reliance was placed on *Shireburne* v. *Hitch*. From the marginal note of that case, it would appear that some such proposition was laid down. But the case of *Shireburne* v. *Hitch* is distinguishable from the present upon two grounds. In that case there was no allegation that any person had been seised of the entire advowson, or of any

(*a*) Notwithstanding the probability that the right of presentation in the then next turn would not come to be exercised for "half a century," (*ante*, 487,) 20*s*. could hardly be considered as any thing more than a *nominal* sum, even in 1672, with reference to the fourth part of the advowson *in fee* of a church, of which the (minimum) value in 1825 was assessed at 600*l*. a year, (*ante*, 469.)

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right or interest in the advowson, so as to have that seisin which the law requires, and which is analogous to the taking of esplees in a writ of right or other real actions. There, no person previously seised of the advowson, had presented. Here, the declaration contains two averments; first, that the party seised in fee of the advowson presented; secondly, that the eldest coparcener also on non-agreement presented.

The next objection proceeds on the supposition that the second and third presentations were by usurpation, and many authorities were cited to shew the effect of a presentation by usurpation. The foundation of this objection fails, for upon this record we cannot take it that any of those presentations were by usurpation. It is said, that the first presentation in the fourth turn must be taken to have been by usurpation, inasmuch as an allegation to that effect in the second plea (*a*) is not traversed. Assuming this to be so (*b*), that usurpation was after 7 *Ann.* c. 18 (*c*), and therefore can have no effect in displacing the possessory title, upon which the writ of quare impedit is founded.

A third objection is, that although non-agreement in presentation may operate as a partition of the advowson for a number of turns equal to the number of coparceners, yet it cannot have that effect *afterwards*; and that it ought to have appeared that after the fourth turn, the coparceners *again* disagreed. For this no authority has been cited; and the effect of *disagreement* by coparceners, as Lord *Coke* states (*d*), is the same as if they had made *partition* of the advowson; and the effect of that, as he also states (*e*), would be to give to each coparcener an interest in an undivided portion of the advowson,—which must continue until altered by all the parties by some fresh deed or some new agreement.

The next objection is disposed of by the verdict, the jury having found that the deed-poll of 1672, which imported

(*a*) *Ante*, 464, 465.

(*b*) *Sed vide ante*, 478 (*b*).

(*c*) And see the provisions as to the times of limitation in actions of quare impedit in 3 & 4 *Will.* 4, c. 27, ss. 30, 31, 32, 33, 34.

(*d*) 2 Inst. 365; *ante*, 493.

(*e*) Co. Litt. 18 a.

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on the face of it to be for money and for service performed, (which may be a valuable consideration,) and for other valuable causes and considerations besides, *was* a deed made for valuable considerations. We cannot upon a writ of error say, that that finding of the jury was wrong.

The other objections relate entirely to collateral matters which were disposed of upon motion in the Court of Common Pleas. This is the first time in which any objection arising out of collateral matters has been taken on a writ of error, and probably it will be the last.

Judgment affirmed (*a*).

(*a*) The following application had been unsuccessfully made to the Court of Chancery.

Lincoln's Inn Hall, Saturday, 25 July, 1829.

Mr. Serjt. *Edward Lawes* moved upon notice "that his Majesty's writ might be issued out of and under the seal of the High Court of Chancery, directed to the Right Hon. Sir *N. C. Tindal*, knt. Lord Chief Justice of his Majesty's Court of Common Bench at Westminster, requiring the said Chief Justice to send *the residue of the record and process* in a certain action of quare impedit, lately depending in that Court, whereupon a writ of error has been brought, and which is now depending in his Majesty's Court of King's Bench at Westminster, wherein *William Lord Bishop of Exeter*, and *George Pyke Dowling*, are plaintiffs in error, and *Jenefer Gully*, *Jeremiah Trist*, *John Hearle Tremayne*, and *Thomas Graham*, are defendants in error, and all other things touching the same now remaining of record in the same Court of the Bench."

This motion was founded upon an affidavit made by the agent of the plaintiffs in error, in which the following facts were stated:—

"That the writ of error was brought upon a judgment given by the Court of Common Pleas in an action of quare impedit, wherein the plaintiffs in error were defendants, and the defendants in error were plaintiffs, which action was commenced in the early part of 1826, and first tried before *Park*, J., at the Devon Spring Assizes in 1827, on a nisi prius record containing various issues of fact, chiefly on facts stated in the declaration as constituting the title of defendants in error, and several issues in law triable by records, and one on a demurrer to the replication; and on that trial the defendants in error were nonsuited, the judge being of opinion that they had failed in proving that one *John Stevings* devised a purparty of the advowson in question, as stated in the declaration; which question turned on a point of law, whether an advowson in gross passes in a will under the word "tenements;" and the Court of Common Pleas, in the following Trinity term, made a rule absolute for

The Court of Chancery will not award a writ of diminution, requiring one of the superior Courts,—which has given a judgment upon which error is brought,—to certify the residue of the record and process, upon a suggestion, supported by affidavit, that such Court has not returned an original record existing in the cause, for which the record returned has been substituted in such Court by amendments ordered to be made by rule of such Court.

The proper mode of objecting to such amendments is by tendering a bill of exceptions.

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setting aside the nonsuit and granting a new trial, on the ground that the judge's opinion was wrong in point of law, and the Court afterwards made various rules for giving the defendants in error leave to alter their declaration in the statement of their title in many material respects, on which issues had been before taken and joined, and made other rules compelling the plaintiff in error, *G. P. Dowling*, to plead de novo, and refusing him leave to plead so as to enable him to take the opinion of a Court of Error on the construction of the devise, or to plead any other of the pleas on which issues had been before joined, except two, which were confined to one point, namely, the validity or efficacy of a certain alleged deed of grant, of 6th April, 1672, stated in the declaration, and that a new record of Nisi Prius was made, and the cause tried again at the last Devonshire Summer Assizes before the same learned judge, when a verdict was given for the defendants in error.

That all the said matters will appear from the court-rolls, issue-rolls, record of nisi prius, panels of jurors, and postea or entry of nonsuit, and writs of venire facias and habeas corpora juratorum, relating to the first trial, and the subsequent rules of Court and affidavits filed of record in the Common Pleas, which, or some of which, this deponent is advised by the counsel of the said *Geo. Pyke Dowling* are erroneous in point of law, and material to be certified to the Court of King's Bench on the writ of error there now depending, but that the record certified thereon contains the last declaration, and the pleadings and proceedings thereon only; that for the obtaining a reversal of the said judgment for divers errors in the body of the record so certified, as well as for other errors of the Court of Common Pleas in not giving judgment on the said nonsuit, and in the subsequent rules and proceedings of the said Court above suggested, errors were assigned and diminution alleged on the writ of error in the Court of King's Bench, in Hilary term last, and a writ of certiorari awarded and issued thereupon, directed to the Right Hon. Sir *William Draper Best*, knight, then His Majesty's Chief Justice of the Court of Common Pleas at Westminster, to certify to our lord the king certain court-rolls and issue-rolls, then and now remaining of record in the same Court in the cause, and also a certain record of nisi prius, with a certain postea or entry of nonsuit thereon, and certain writs of venire facias and habeas corpora juratorum in the same cause, and all things belonging to the said record of nisi prius, and the proceedings had thereupon, or otherwise relating to the matter so assigned for error, in his custody or power,—which writ of certiorari was so issued out of and under the seal of the Court of King's Bench on the 4th of May last.

That the writ of certiorari was by this deponent delivered to and left with Mr. *Charles Harden*, then the principal clerk of the said Lord Chief Justice, at his chambers in Serjeant's Inn, Chancery Lane, on the 5th of the said month of May, when this deponent pointed out to Mr. *Harden* the several records required by the writ to be certified, and informed him what officers had the custody of them.

That another writ of certiorari was awarded and issued on the said assignment of errors and allegation of diminution, directed to *George Watlington*, esq., *Henry Bellwood Ray*, esq., and *Thomas Hudson*, esq., prothonotaries of the Court of Common Pleas, and to *George Griffith*, esq., *Jonathan Hewlett*, esq., and *John Henry Cancellor*, esq., secondaries, to certify to our said lord the king certain rules and orders of the Court of Common Pleas in the said cause, touching the matters assigned for error therein as aforesaid, together with all affidavits and things relating thereto filed of record, in the custody or power of the said prothonotaries and secondaries, or any of them; which last-mentioned writ of certiorari was delivered to and left with Mr. *Sherwood*, the principal clerk to the said prothonotaries, on the 4th of May last, at the prothonotaries' office in the Inner Temple, London.

That the defendants in error having given rules in the Court of King's Bench to return the said certiorari, this deponent applied to the officers whose duty he conceived it was to forward the preparing of the copies of the several documents required to be certified, respecting the same, when this deponent was informed by such officers that the said late Lord Chief Justice had received the said first-mentioned writ of certiorari.

That a rule for returning the same having been given and expired, and no return having been made to either of the said writs of certiorari, this deponent, on Friday 29th May last, waited upon the said late Lord Chief Justice, at his chambers in Serjeants' Inn aforesaid, and respectfully requested of his lordship to make a return to the said first-mentioned writ of certiorari; but his lordship was pleased to declare to this deponent that he should not make any return to the writ.

That on application to the said *Jonathan Hewlett* to ascertain if it was intended to make a return to the said other writ of certiorari, this deponent was informed that such return was intended to be made; and being advised by the counsel of the said *George Pyke Dowling* that it was material and necessary to procure the said first-mentioned writ of certiorari directed to the said Lord Chief Justice to be returned in support of the said assignment of errors and allegation of diminution, this deponent instructed the said counsel to move the said Court of King's Bench for that purpose, and an application was accordingly made to the said Court on the part of the said *G. P. Dowling*, on or about the 30th May last, being the last day but one of the last term, for an alias writ of certiorari, directed to the said late Lord Chief Justice, but the said Court did not then grant a rule for such alias writ.

That he hath not yet been able to procure any return to be made to either of the said writs of certiorari, the prothonotaries and secondaries also having since refused to make any returns to the said writ of certiorari so directed to and served on them as aforesaid.

That since last term Sir *Nicolas Conyngham Tindal*, knight, hath been appointed and taken his seat as Lord Chief Justice of the said Court of Common Pleas, and that no motion or application hath at any time been made by or on the part of the said defendants in error to

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quash or set aside or vacate the said writs of certiorari or either of them, and that all the records and matters stated in the said assignment of errors and allegation of diminution exist in fact, and are therein truly and bonâ fide stated, and he is advised by the counsel of the said *George Pyke Dowling*, that it may be very important to the interests of the said *G. P. Dowling* that the several matters and things alleged as diminution of the said record now before the said Court of King's Bench, or such of them as he may be by law entitled to, should be certified to the said Court.

That since the applications so made to the said Court of King's Bench in last term as aforesaid, the said defendants in error have pleaded in nullo est erratum in this cause, and have moved, and obtained a rule, for a concilium, and have set down the said cause for argument.

That a renewed application was, on Friday 1st July instant, made to the Court of King's Bench for leave to issue other writs of certiorari, but the said Court of King's Bench refused to grant permission to issue either of the writs of certiorari prayed.

That on the 8th day of July instant a motion was made by counsel on the part of the said *George Pyke Dowling*, before the Right Hon. the Lord High Chancellor of Great Britain, for leave to issue out of and under the seal of this Honourable Court, His Majesty's writ of diminution, directed to the Right Hon. the Lord Chief Justice of His Majesty's Court of Common Pleas, commanding the said Chief Justice to send into this Honourable Court, under his seal, distinctly and plainly, the residue of the record and process of a plaint which was in the said Court of Common Pleas before the Right Hon. Sir *William Draper Best*, knight, late Chief Justice of the same Court, and his associates, justices of the said Court, between the said *Jenefer Gully*, &c., plaintiffs, and the said *William Lord Bishop of Exeter*, and the said *George Pyke Dowling*, defendants, in a plea of quare impedit, for not permitting the said *Jenefer Gully*, &c. to present a fit person to the rectory and parish church of Berrynarber in the county of Devon, which was void and in the gift of the said *Jenefer Gully*, &c. and also all other things touching them which, as it was said, remained in the said Court of C. P. to be sent.

That upon such motion being made, the Lord Chancellor was pleased to state that he considered it to be quite of course that the said writ of diminution should issue, and directed application to be made to the proper officer of the said Court, and stated that if he made any difficulty about it, or refused to issue the same, then that the counsel for the said *George Pyke Dowling* was to be at liberty to apply specially to this Honourable Court.

That in consequence thereof this deponent did, on Thursday the 9th day of July instant, apply to Mr. *Appleyard*, who is or acts as cursitor in this Honourable Court for the county of Devon, in which the said parish of Berrynarber is situate, for the said writ of diminution, and at the same time this deponent acquainted him with what had passed in this Honourable Court upon the aforesaid motion, and requested him to

issue the said writ of diminution, which the said Mr. *Appleyard* did not then object to do, but as he had never had occasion to issue such a writ in his practice as a cursitor, he requested deponent to bring to him the draft or form of the said writ.

That in consequence of such request this deponent did get the form of such writ drawn by the counsel of the said *G. P. Dowling*, and on Friday the 10th day of July instant delivered a fair copy of the said form so drawn by the counsel for the said *G. P. Dowling* to Mr. *Appleyard*, and again requested him to issue the said writ, but the said Mr. *Appleyard* at that time declined to issue the said writ until he had an opportunity of consulting with the secretary of the Lord Chancellor thereon, in consequence of the infrequency of such writs being issued, and promised this deponent that he would take an early opportunity of seeing the said secretary upon the subject, and of informing this deponent thereof.

That the said Mr. *Appleyard* hath since caused a message to be conveyed to deponent that he could not issue the said writ until an order for that purpose was obtained from the Right Honourable the Lord Chancellor.

That a true copy of the errors assigned and diminution alleged by the said *G. P. Dowling*, in the said Court of King's Bench, in the said writ of error, so far as relates to the motion intended to be made before the Lord Chancellor, on Saturday the 25th day of July instant, is set forth in the exhibit or paper writing, marked with the letter A., produced and shewn to this deponent at the time of swearing this his affidavit."

E. Lawes, Serjt., in support of the motion. The writ for which the plaintiffs in error now apply is to be found in the Register. It is true, as was thrown out by the Court upon the former application, that no precedent for such a motion can be referred to. The reason is obvious, namely, that the issuing of such a writ has been considered a matter of course, and it might issue without motion, and no case can be found in which such a writ has been denied. The usual mode has been to take the writ from the office as a matter of course. It was, however, thought more decorous to apply to the Court. The only question now is, whether the writ shall be refused or not. The form of the writ was sent to the office with no other deviation from that in the register than the nature of the action rendered necessary. When the application was made in the King's Bench, the Court said, "You ought to allege diminution." I said, "I had alleged diminution," and I now apply for the writ moved for in the Court of King's Bench. [Lord *Lyndhurst*, C. The writ prayed for recites that it is *shewn* to the king that some part of the record and process, and certain other things touching the same, still remain in the Court below. You are bound to satisfy me that the proceedings are part of the record.] From the alteration which has been made in the record, the plaintiff in error is prevented from taking the opinion of the Court of King's Bench as to the construction of the devise. Error is assignable upon every part of the record, 11

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Co. Rep. 39, 41; and that this may be done the whole record ought to be returned. Here are two declarations and two rolls upon the same original. In Style, 292, it was held that the imparlance roll ought to be returned as part of the record. [Lord *Lyndhurst*, C. The imparlance roll and the plea roll are part of the *same* record.] The plaintiffs in error are entitled to have the two declarations, and the pleas, and the issue roll, and the nisi prius record; 2 Nels. Abr. *Error*, (D); 10 Vin. Abr. *Error*, (I c. 4.)

The documents which it is the object of the present motion to get returned, are *records*, and ought to be certified. The plaintiff in error wishes to raise the point, whether the Court has authority to grant a new trial upon a point of law. The law is not altered by the mere circumstance of there not having been any occasion to resort to the particular remedy for a considerable length of time. Thus the Courts have lately recognized the right of the subject to insist upon wager of law, *King* v. *Williams*, 4 Dowl. & Ryl. 3; and wager of battle, *Ashford* v. *Thornton*, 1 Barn. & Alders. 405. [Lord *Lyndhurst*, C. Can you cite a case in which a Court of Error has inquired into the *interlocutory* proceedings of the Court below?] In *Greene* v. *Cole*, 2 Saund. 252, the granting of a new trial was expressly assigned as error. [Lord *Lyndhurst*, C. That was the case of an inferior Court.] In the Palace Court, which is an inferior Court, it is a matter of every day's occurrence. In 1 Lev. 310, it was said that the proper course was to return the two verdicts in the first instance, because being an inferior Court *diminution* could not be alleged. If, therefore, it had not been an *inferior Court*, it follows that the omission to return the first verdict upon the writ of error might have been alleged as diminution. [Lord *Lyndhurst*, C. They were bound to return the two verdicts, and they had no power to grant a new trial.] In *Loveday's* case, 8 Co. Rep. 65 *b*. error was assigned upon the granting a venire de novo. The rules of the Court are often as important as its judgments. How is a nonsuit in quare impedit peremptory, if it can be set aside at the pleasure of the Court? A nonsuit in quare impedit is a bar to another action. [Lord *Lyndhurst*, C. Why should not the Court set aside a nonsuit or a verdict in quare impedit, as in any other action? A learned judge says at nisi prius "that the action cannot be maintained," and he turns out to be mistaken. Cannot the Court set this right? A nonsuit is mere machinery in modern times. The Court of King's Bench, upon the application for the alias certiorari, according to the note which has been furnished me by Mr. *Manning*, thought that the granting of such a writ would introduce great confusion. The amended record is not, in fact, a *second* record, but a *substituted* record. The Court of Common Pleas had power to amend the record upon a summary application.] Where is the power of a Court of common law to substitute one record for another? [Lord *Lyndhurst*, C. They have power to grant leave to the parties to amend.] If the plaintiffs below had any objection to make to the pleas, they should have shewn cause against the rule to plead several matters. This writ

binds the Chief Justice to certify the *original* record. [Lord *Lyndhurst*, C. The effect would be to carry before the Court of Error all the mass of interlocutory matter. Have you ever seen an example of such a writ? The Court of Common Pleas assume the right to make these rules, and act upon it. If you thought they had not the right, you might have tendered a *bill of exceptions*. In *Greene* v. *Cole*, the only case which has been referred to upon this point, a new trial was granted by an *inferior* Court which had no power to grant one.]

Manning, contrà. In *Greene* v. *Cole* a *venire de novo* was granted, which is very distinguishable from a *new trial*. The award of a venire de novo is always founded upon some irregularity or miscarriage apparent upon the face of the record; whereas a rule for a new trial is an interposition by the Court in the discretionary exercise of its equitable jurisdiction, for the purpose of relieving the party against a *latent* injustice. After a new trial has been had, the record is in the same state as if no trial except the last had taken place, whereas, upon a venire de novo, the fact of the first trial and the circumstances under which that trial became nugatory, and rendered a second trial not a matter of *discretion*, but of *right*, necessarily appear on the record. When that distinction is adverted to, *Greene* v. *Cole* will be found to have no bearing upon the present case.

Lawes, Serjt. A venire de novo is always awarded upon a new trial. [Lord *Lyndhurst*, C. I think no ground has been laid to induce me to interpose and give any special direction to the officer.] In *Mellish* v. *Richardson*, 7 Barn. & Cressw. 819, the Court of King's Bench granted a writ of certiorari to bring up rules from the Common Pleas for the purpose of putting them on the record in the King's Bench. [Lord *Lyndhurst*, C. In *Mellish* v. *Richardson* rules had been granted in the Common Pleas for amending the record, which had been sent up to the King's Bench without those amendments. The Court of King's Bench directed these rules to be sent up, for the purpose of enabling them to make corresponding amendments in the King's Bench. (*Vide* 1 Clark & Finn. 244.)] Office copies of rules are received in evidence, which proves that they are records. The plaintiffs in error wish to have an opportunity of trying whether the Court has the power to grant a new trial in quare impedit, and whether, after granting leave to plead several matters, they have power to withdraw that leave, and make such rules as they have done, without the party's having any power of appeal.

Lord LYNDHURST, C.—My judgment is, that the plaintiffs in error have not made out a case for having this writ. After an amendment is made, the amended record is *the record*. No sufficient ground has been laid for my interference, and I give no direction on the subject. The Court of King's Bench have refused an application, which though not for a writ of diminution, was similar in effect, and was moved for on the same grounds, and I entirely concur with that Court

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in thinking that such a course would introduce the greatest confusion in the administration of justice.

Rule refused.

Authority of justices of assize to give judgment and award execution for the defendant upon a nonsuit in quare impedit.

Upon the nonsuit being obtained at the first trial upon the record as it originally stood, *E. Lawes*, Serjt., applied for a writ to the Bishop to admit the defendant under the provision in Westm. 2, c. 30, "excepto quod assisæ ultimæ præsentationis et inquisitiones super quare impedit atterminentur in proprio comitatu coram uno justiciario de banco et uno milite, ad certos tamen diem et locum in banco statutos, sive defendens consentiat, sive non; et ibi *statim* reddatur judicium."

The application was heard and discussed at the judges' lodgings at Exeter, before *Park*, J. and *Littledale*, J., the former (as observed by the learned judges) being *justiciarius de banco* and both being *milites*.

E. Lawes, Serjt., for the defendant. In quare impedit a nonsuit is peremptory and final. *Com. Dig.* tit. *Pleader* (3 I 11). The statute directs that judgment shall be given immediately; and Lord *Coke*, in commenting upon this statute, says, "And this branch giving to the justices of nisi prius power to give judgment, they have thereby power, includedly as incident, given to award execution, that is, a writ to the bishop; but that writ is not returnable." 2 Inst. 424.

Bayly and *Manning*, contrà. Though the judges are *authorised* by Westm. 2, c. 30, at nisi prius to pronounce judgment and award a writ to the bishop, they are merely placed in the situation of the Court above, and are not required to deprive that Court of the opportunity of considering the correctness of the view of the law taken at the trial, and the propriety of the verdict or nonsuit. That statute has passed more than 500 years, and no instance is shewn in which the discretionary power it gives has been acted upon, though cases, both of verdicts and of nonsuits, must often have occurred in which the title of the defendant to the presentation has been perfectly clear. Here, on the contrary, the plaintiffs have been nonsuited on a point which at least is sufficiently doubtful to require the examination of the Court out of which the record comes; for though a *nonsuit* in quare impedit is *peremptory*, it is not more so than a *verdict*. No evidence has been given in support of the title which the defendant has thought proper to set out on the record, but which the plaintiffs have had no opportunity of controverting. (*Ante*, 478(*b*).) It may be difficult to say what is meant in the books by the defendant's *making title*, yet whilst a defendant's title rests upon his own simple unsupported assertion, the Court will not interfere in this extraordinary manner.

The learned judges thought that this was not a case in which they were called upon to exercise the power given by the statute.

Writ refused.

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The KING *v.* ROBERT PEASE (*a*).

A timber-merchant, residing at the town of A., and sending timber from the town of B. to the town of C., where it is sold by auction, is a hawker requiring a licence under 50 *Geo.* 3, c. 41, s. 7.

So, although the place of sale be a village.

THE defendant was convicted, by a justice of the peace, of having, on the 6th day of November, 1828, within the extra-parochial limits of the castle of Nottingham, as a hawker, exposed to sale certain goods, wares and merchandizes, to wit, a quantity of timber, without having any licence so to do, contrary to the form of the statute, whereby the defendant had forfeited for the said offence the sum of 10*l*. At the Epiphany sessions, 1829, the Court of Quarter Sessions quashed this order, subject to the opinion of this Court upon the following case:—

The appellant is a timber-merchant, residing and carrying on business at Leeds. Early in November last he bought a large quantity of mahogany at Hull, which he caused to be conveyed by water through Nottingham, and deposited on a wharf situate within the extra-parochial limits of the castle of Nottingham. On the 6th November the appellant employed an auctioneer to sell the mahogany by public auction, and a considerable quantity of it was sold by auction on that day. The appellant attended the sale, and assisted thereat. The appellant had no hawker's licence, and had no place of residence or business at Nottingham.

Balguy, in support of the order of sessions quashing the conviction. This case depends upon the construction of 50 *Geo.* 3, c. 41, s. 7; and the question is, whether, upon the facts stated in this case, the Court can say that the defendant is a hawker, or a person trading from town to town. The Court of Quarter Sessions have held that the defendant did not come within either of these descriptions. This is not the description of person, nor is it such an act of selling, as was contemplated by the legislature. It is difficult to say that this defendant was a hawker; but it will probably be

(*a*) This case was decided in last Michaelmas term.

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contended that he was a trader from town to town. No act of trading is stated, except the consignment of goods from Hull. Only one town is mentioned. The goods merely passed through Nottingham. [Lord *Tenterden*, C.J. A village would do. The place of sale need not be a corporate town.] *Rex* v. *Little* (*a*). The prosecutor ought to show an act of trading before the doing of the act complained of; as otherwise, not having become a trader till then, he would not have been under any previous obligation to take out a hawker and pedlar's licence. It is proper to state to the Court, however, that in *The Attorney-General* v. *Tongue* (*b*) and *The Attorney-General* v. *Woolhouse* (*c*), it was held that one act of selling was sufficient. This timber was a raw material, and not a manufacture. [Lord *Tenterden*, C.J.—Fruit and vegetables are excepted, but there would have been no necessity for such an exception if the general prohibition had been restricted to manufactured goods.] The object of the statute was to protect the resident dealer. [*Bayley*, J. Here, to protect the resident timber-merchant.] The cases which have been decided upon this statute are all of small retail dealers. The cases are all where the goods are manufactured or in a state for immediate consumption. The expression, "selling from house to house," shews that the goods contemplated by the legislature were goods ready for immediate use. The timber described in this conviction must be taken to be the raw

(*a*) 1 Burr. 609; *S. C.* 2 Ld. Kenyon, 317.

(*b*) Cited 1 Younge & J. 466, from 2 Burn's Just. 785; since reported 12 Price, 51.

(*c*) 1 Younge & J. 462, and 12 Price, 65. In that case a cabinet-maker, who resided at Leicester and had a shop there, sent certain goods to Ashby-de-la-Zouch in a cart, which he accompanied on foot part of the way, and then went by coach to Ashby-de-la-Zouch, where he employed an auctioneer, and sold the goods by auction; it was held that he was a trading person, travelling from town to town, within 50 *Geo.* 3, c. 41, s. 7, and that it was not necessary, in an information for the penalties thereby incurred, to state that the defendant sold by auction, &c. by opening a room or shop, and exposing to sale his goods, &c. by retail.

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commodity in bulk. Instead of injuring the retail dealer, such a sale would be likely to benefit him. It seems to have been thought unnecessary to except any articles in bulk, on the ground that none such were within the purview of the act. [*Bayley*, J. This is not the case of a sale by accident of goods not originally intended to be sold there.]

N. R. Clarke and *Clinton*, contrà, were stopped by the Court.

Lord TENTERDEN, C. J.—I cannot distinguish this case from that of *The Attorney-General* v. *Woolhouse*.

The other judges concurred.

Rule absolute to quash the order of sessions (*a*).

(*a*) And see *Moore* v. *Edwards*, 2 Chit. Rep. 213; *Rex* v. *Selway*, ib. 522; *Rex* v. *Websdell*, 3 Dowl. & Ryl. 360, 2 Barn. & Cressw. 136; *Rex* v. *Farady*, 1 Barn. & Adol. 275; *Simson* v. *Moss*, 2 Barn. & Adol. 543; *Rex* v. *Mainwaring*, *ante*, 36, 10 Barn. & Cressw. 66; *Rex* v. *Hodgkinson*, *ante*, 162, 10 Barn. & Cressw. 74.

COCKERELL and another *v.* CHOLMELEY. (In Error.)

ERROR upon a judgment in formedon. The count set out a portion of the will of Sir *Henry Englefield*, Bart., by which Land with the appurtenances was devised to *A.* and his heirs for the use of *B.* for life, without impeachment of waste, with remainders over, with power to *A.*, at the request of the successive cetteux que use, to sell the estate; and to that end *A.* was empowered by deed to revoke the uses in the will, and by the same or any other deed to convey the estate to the purchaser. *A.* sold the estate, exclusive of the timber upon it, and by deed revoked the uses in the will, and conveyed the estate to the purchaser; and by the same deed *B.* sold and conveyed the timber to the purchaser:—Held, that the power was not well executed, and that the revocation was void.

Where, in formedon, the demandant succeeded upon a demurrer to the replication, and obtained a verdict upon the trial of an issue in fact, and judgment was given thereon that he should recover his seisin against the tenant, and upon writ of error brought, the common errors were assigned, and judgment was affirmed:—Held, that the demandant was entitled to double costs under 13 *Car.* 2, st. 2, c. 2, s. 10.

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he devised certain manors and tenements, with the appurtenances therein mentioned, to Lord *Cadogan* and Sir *Charles Buck*, and their heirs, upon trust (*a*),—for the eldest son of Sir *Henry Englefield* for life, without impeachment of waste; remainder to the trustees, to preserve contingent remainders; remainder to the first and other sons of his eldest son, in tail male; remainder to his second son for life, without impeachment of waste; remainder to trustees, to preserve contingent remainders; remainder to the first and other sons of his second son, in succession in tail male; remainder to the demandant's mother for life, without impeachment of waste; remainder to trustees, to preserve contingent remainders; remainder to her first and other sons, in succession in tail male. The count then alleged the death of the testator (*b*), the death of his two sons without issue, the death of the demandant's mother, and that the demandant was her eldest son, and as such entitled to the estate, as entailed in remainder.

The eighth plea (*c*) stated that the testator, by his will, declared "that it should be lawful for the trustees and the survivors of them, at the request and by the direction and appointment of the person who for the time being should be in possession of, or entitled to, the rents and profits of the manors and tenements aforesaid, with the appurtenances above demanded, by virtue of the limitations therein contained, signified by any deed or writing under his or her hand and seal, attested by two or more witnesses, to make sale and dispose of, or to convey in exchange for other manors, lands, tenements and hereditaments, any part or parts of the manors and tenements aforesaid, with the ap-

(*a*) i. e. "to the *use* of;" these *trusts* being executed by the statute.

(*b*) The count also alleged the death of the testator's wife, for whose benefit a term had been created, which had determined by her death.

(*c*) There were other pleas upon which issues were joined and the demandant proceeded to trial, and had a verdict, but the question before the Court turning exclusively upon the eighth, it is unnecessary to set out the rest.

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purtenances above demanded, to any person or persons whatsoever, either together or in parcels, for such price and prices in money or any other equivalent, as to them the trustees, or the survivor of them, or the heirs of such survivor, should seem just and reasonable, and to that end for the said trustees or the survivor of them, or the heirs of such survivor, by any deed or deeds, writing or writings, under their hands and seals, sealed and delivered in the presence of two or more witnesses, to revoke, determine and make void all and every or any of the uses, trusts, powers, provisoes and limitations thereinbefore limited, created, provided and declared, of and concerning the manors and tenements aforesaid with the appurtenances above demanded, to be sold, disposed of, or exchanged, and by the same or any other deed or deeds, writing or writings, to be sealed and attested as aforesaid, to limit and appoint the manors and tenements aforesaid, with the appurtenances above demanded, whereof the uses should be so revoked, either unto such purchaser or purchasers, or to the person or persons making such exchange, and his, her, or their heirs or otherwise, and to limit, direct or appoint such new or other use or uses, trust or trusts, of or concerning the manors and tenements aforesaid, with the appurtenances above demanded, as should be requisite and necessary for the executing and effecting of such sales, disposals or exchanges; and upon payment and receipt of the money arising from the sale of the said premises, or any part or parts thereof, which should be absolutely sold as aforesaid, to give and sign proper receipts for the money for which the same should be so sold." The plea then stated that Lord *Cadogan*, in pursuance of this power, after the decease of Sir *Charles Buck*, at the request of Sir *Henry Charles Englefield*, the first tenant for life, sold the estate to *Byam Martin* for 13,400*l.*, which Lord *Cadogan* judged to be a reasonable price for the same, and then set out so much of the deed from Lord *Cadogan* to *Byam Martin* as revoked the original uses of the will, and conveyed the estate to

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trustees for *Byam Martin*, in fee, for the sum of 18,400*l.*, making profert of that deed; and then deduced title from *Byam Martin* and his trustees to the tenant.

The replication to this plea craved oyer of and set out the deed of conveyance from Lord *Cadogan* to *Byam Martin*. By that deed—reciting the power, and that Lord *Cadogan* had contracted to sell the estate, *exclusive of the timber growing upon it*, to *Byam Martin*, for 13,400*l.*, and that Sir *H. C. Englefield* had contracted to sell the timber to *Byam Martin* for 2448*l.*—Lord *Cadogan* appointed the estate, exclusive of the timber, to *Byam Martin* and his heirs; and Sir *H. C. Englefield* sold and assigned the timber to *Byam Martin* and his *heirs*, and acknowledged the receipt of 2448*l.* for the same, both in the body of the deed and by a receipt on the back of it. The replication then set out the will of Sir *Henry Englefield*, and the power therein contained as stated in the plea, and alleged the execution of the power to be imperfect, inasmuch as the trustee, Lord *Cadogan*, had sold the *land* only, and had allowed the tenant for life, Sir *H. C. Englefield*, to sell the *timber* growing thereon and to receive the price of such timber.

To this replication there was a general demurrer, and a joinder in demurrer.

The case was argued in the Court of Common Pleas in Michaelmas term, 1825 (*a*), when judgment was given for the demandant. There were other pleas upon which issues were joined, and the demandant proceeded to trial, and obtained a verdict. The record being removed by writ of error into this Court, the case was now again argued by

Peake, Serjt., for the plaintiffs in error. The question in this case is, whether the deed of conveyance from Lord *Cadogan* to *Byam Martin* was a good execution of the power of sale contained in the will of Sir *Henry Englefield*. The objection taken is, that Lord *Cadogan* sold the land only, and permitted Sir *Henry Charles Englefield* to sell the

(*a*) Reported B. Moore, vol. x. 246, xi. 17; Bingh. iii. 307, v. 48.

timber and to receive the money for it. Notwithstanding this objection, it is submitted that the deed is a good and sufficient execution of the power. Sir *H. C. Englefield*, being tenant for life without impeachment of waste, would have been entitled, if the estate had not been sold (and it could not be sold without his consent), to cut down the timber and receive the value of it; and if he preferred to waive his right to do so, and to consent to the estate's being sold, together with the timber, he was equally entitled to take that course, and to receive from the purchaser of the whole so much of the purchase money as was the actual value of the timber. If that be so, the trustee, in permitting him to receive that money, has not deviated from the power. This, like every power, must be construed with reference to the objects which the testator had in view in creating it. His first and favourite object was to keep the estate in the family, giving the timber to the tenant for life; his second object was, in the event of its being found more beneficial to the family to sell or exchange the estate, to empower the trustees to do either the one or the other, at the request of any person in possession as tenant for life. The power to sell the estate, therefore, was made dependent upon the request of the tenant for life for the time being; and it is clear that no tenant for life would ever make that request, unless he was to have at least the same advantages as he would have had if the estate continued unsold. One of those advantages was, that while the estate continued unsold, he might at any time have cut down the timber, and have applied the proceeds of it to his own use. To have done this would not only have lessened the estate in value to the amount of the money for which the timber was sold, but would also have taken from it that imaginary and yet marketable value which invariably attaches to estates upon which old and ornamental timber is standing. It was therefore clearly for the interest of all parties that the timber should stand, and be sold together with and as part of the estate; and if the tenant for life consented to that

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course, upon what principle of justice can it be said that he was not entitled to receive the money which that timber was worth? In *The Countess of Plymouth* v. *Lady Archer* (*a*), where lands were devised to trustees to be sold, and other lands were to be purchased in their stead, and *A.* was to be tenant for life, without impeachment of waste, of the lands to be purchased, and the rents and profits of the lands to be sold were to be to the same uses, it was held that *A.* could not cut down timber on the lands to be sold; but the reasons were, first, that *A.* had no interest in the lands to be sold, as they were given to the trustees in the first instance; and secondly, that as *A.* was to be tenant for life, without impeachment of waste, of the lands to be purchased, if he might commit waste upon the other estate before it was sold, he would have the benefit of double waste. But, even if the tenant for life was not entitled to the value of the timber, still the power was well executed by the deed, so far as it revokes the uses of the will. The power, in express terms, authorizes the revocation of the old uses by one deed, and the conveyance of the estate and creation of new uses by another. Now, if the old uses have been revoked, (as they have been,—for the conveyance of the estate operated as a revocation of the uses of the will,) the demandant cannot sue in formedon, for his estate is thereby divested. This case is perfectly distinguishable from that of *Doe* d. *Willis* v. *Martin* (*b*), by which it was contended in the court below it must be governed; for, in the first place, that case was decided principally on the ground of fraud; and, in the second, Lord *Kenyon* there said, "the revocation and conveyance were necessarily one act, and must be done by one and the same deed." Here, no fraud is or can be imputed; and the application of the money produced by the sale is a distinct and separate act, to be done after the sale of the estate. Even if the payment by the trustee to the tenant for life of a part of the

(*a*) 1 Bro. Ch. Rep. 159. (*b*) 4 T. R. 39.

purchase money, namely, the price of the timber, is considered a misapplication pro tanto, still it was done bonâ fide, and there is nothing to shew that it shall affect the purchaser: on the contrary, payment to the trustees is made a discharge for such money as is paid, and the remainder-man can have at most only an equitable lien as against the tenant for life for such money as has been improperly paid to him. *Roper* v. *Hallifax* (*a*).

Cross, Serjt., contrà, was stopped by the Court.

Lord TENTERDEN, C.J.—I am of opinion that the judgment of the Court of Common Pleas, in this case, ought to be affirmed. In forming that opinion, I have not treated this case as one of fraud, but as a case of failure of compliance with the condition upon which alone the uses mentioned in the testator's will could be revoked, and the estate applied to other uses. It has been argued, that the revocation of the uses may be good under the power, though there may not have been a valid sale according to the power. That argument rested mainly on the observation, that the old uses may be revoked by one deed, and the estate conveyed, and new uses created, by another,—which is certainly not inconsistent with the language of the will. But looking at the whole of the language of the power contained in the testator's will, it seems to me quite clear, that there can be no valid revocation of the uses mentioned in the will, unless that revocation is made, (to use the very words of the power,) "*to the end*" that a conveyance may be made of the estate. A conveyance of the estate must be the very end and object of the revocation. The question, therefore, is, whether, looking at the whole of this deed, the end and object of the revocation was a conveyance of the estate. Now it appears, as well by the contract made prior to the revocation, as by the deed of conveyance, that the trustees

(*a*) 8 Taunt. 845; and Sugd. Pow. App. No. 4.

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contracted to sell the land "exclusive of the timber growing upon it," for a certain specific sum of money; and that the tenant for life, by the same instrument, contracted to sell the timber growing upon the land, for another specific sum of money; and when these contracts were executed by the deed of revocation and conveyance, the trustees conveyed the land in consideration of one sum of money, and the tenant for life conveyed the timber in consideration of another sum of money paid to him. This, it is said, might lawfully be done, because the tenant for life, being without impeachment of waste, might lawfully have cut down all the timber, and converted the proceeds to his own use. It does not seem to me material to consider, whether he could by law have cut down timber to the extent of that which he sold, because I am of opinion that, according to the terms of the testator's will, if the tenant for life thought fit to consent that the estate should be sold, he was bound to suffer it to be sold in the same state in which it was then, and not to sever the timber from it, but to let the whole go together. There would then be one entire sum to be received for the whole, part of which would be applied to the interest of the tenant for life, and the residue would go to the remainder-man. It is said that the mode of dealing with the estate, adopted in the present case, was beneficial to the family, because, if the tenant for life had cut down the timber before the estate was sold, it would afterwards have fetched much less money. And probably that would be so; but still I think the testator clearly meant, that if the tenant for life consented to a sale at all, he should consent to the estate being sold with all that was on it, as it then stood. That is the ordinary sense and meaning of the words, "sale of an estate;" for though, in estimating the price, the land and timber are sometimes valued separately, still the whole sum is paid at once, and it is considered as one price, and that is, in my opinion, what the testator in this case intended. That being so, the intention of the testator has not been complied with, therefore the power given by his will has

not been well executed, the uses have not been revoked, and the demandant is entitled to recover. We may regret, and I certainly do for one, that a transaction which, so far as we can judge of it, appears to have been fairly intended, should fail in its effect; but whatever regret we may feel, we are bound to decide according to law. In that view of the case, I think we are bound to say, that the power has not been well executed; that the demandant is entitled to recover; and, consequently, that the judgment of the Court of Common Pleas must be affirmed.

BAYLEY, J.—I am of the same opinion. I think it clear beyond all doubt, that the deed was not a good execution of the power. The power was to sell *the estate*. The estate, at the time of the sale, consisted of land and of timber growing upon it. The trustees were to sell it in the condition in which it was at that time. The timber was part and parcel of the estate at that time, and the trustees had no authority to divide one part from another. It is said that the tenant for life might, if he had chosen, have severed the timber from the land, and have thereby acquired to himself a distinct interest in the former. It is sufficient in answer to observe, that the tenant for life had *not* acquired such a distinct interest; and having not done so, but allowed the timber to continue parcel of the estate at the time when the conveyance was made, the whole of the purchase-money of the estate, comprising the timber as well as the land, went by law to the person in whom the estate was vested.

With respect to the revocation, if any authority were wanted upon that subject, *Doe* d. *Willis* v. *Martin* (*a*) is in point. It was there held, that the power to revoke was conditional, that is, a power to revoke, and to sell, and to substitute other land, and therefore there could be no valid revocation without a sale and a substitution, as parts of the same transaction. In the present case, indeed, as was sug-

(*a*) 4 T. R. 39.

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gested in argument, the trustees might have revoked by one instrument, and have sold by another; but if they revoke by an instrument which shews that the sale which they intended to effect would be in its nature a defective sale, and not a valid execution of the power, such a revocation cannot be supported. Here they had a right to revoke,—but only to the end that they might sell, and that they might sell pursuant to the power, that is, the entire estate together. Such a sale would put into the possession of the remainder-man, the whole of the money resulting from it; but here, before they revoke, they state, by way of recital in the deed, that there had been a bargain, by which the land was to be sold for one sum of money, and the timber for another, the purchase-money of the timber to be applied, not for the benefit of the remainder-man, but for that of the tenant for life. Now that is a revocation, not for the purpose of making a valid sale, but for the purpose of making a sale which the power does not authorize. I am therefore of opinion that the judgment of the Court of Common Pleas was right.

LITTLEDALE, J.—The power given to the trustees is to sell and dispose of the estate. That can only mean, to sell and dispose of the estate with every thing on it, as it stood at the time. They had no power to divide the land and the timber growing upon it. It was not a good execution of the power, therefore, for them to sell the land, and then for the tenant for life to sell the timber. But then it is said they have at all events revoked the uses in the will. Now a valid revocation could only be made "to the end" that they might make such a sale and conveyance as they were authorized to make; and if they have made a sale and conveyance, but not such a one as they were authorized to make, the end of the revocation is not accomplished, and the revocation itself fails. Though they might make the revocation and the conveyance by separate deeds, it must all be considered as one act. If they made the

revocation to-day, they might make the conveyance to-morrow; still they would be parts of the same transaction; and as the conveyance in this case cannot be carried into effect, the revocation fails also.

PARKE, J.—I am of the same opinion. To the second point made, that the revocation had taken place, and therefore that the demandant's estate had been divested, the answer is, that the power of revocation is given only to the end that such a sale shall be made as is permitted by the power; a revocation made for any other purpose is, therefore, void. That brings us back to the first question—whether the sale made in this case was such a sale as is authorized by the power? Now, I think it clear, from the terms of the power, that the trustees were not authorized to sell the estate without the timber,—that they must sell both together. But they have sold the estate without the timber; that, therefore, is not such a sale as is authorized by the will creating the power; and the power of revocation, having been executed for the purpose of making a sale not warranted by the power, is void.

Judgment affirmed.

Cross, Serjt. then applied for, and obtained a rule for the plaintiffs in error to shew cause why the defendant in error should not recover his damages and costs against the plaintiffs, in error, pursuant to the statutes in that case made and provided; against which

Peake, Serjt. afterwards (*a*) shewed cause. This application is founded upon two statutes, 3 *H.* 7, c. 10, (confirmed by 19 *H.* 7, c. 20,) and 13 *Car.* 2, st. 2, c. 2. The former statute directs the Justices (that is the Court, (*b*))

(*a*) This rule was argued and decided in Easter term, 1830, but from its immediate connection with the foregoing case, it was deemed advisable to insert it here.

(*b*) The Court of Error. See *Salt* v. *Richards*, 7 East, 111. Where the House of Lords affirmed the judgment, and remitted the record without awarding costs

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before whom a writ of error is sued, to give damages and costs for the delay and wrongful vexation, according to his discretion (*a*). It has been sometimes doubted, whether this statute extends to cases where no damages are recoverable in the original action (*b*). In *Henslow* v. *The Bishop of Salisbury* (*c*), one of the earliest cases upon the subject, it was held, that costs were recoverable in a writ of error in quare impedit, though no costs could be recovered in the original writ; and there have been subsequent decisions to the same effect. In *Graves* v. *Short* (*d*), costs were allowed in a writ of error in formedon; but in *Smith* v. *Smith* (*e*), a directly contrary decision was come to; and in *Winne* v. *Lloyd* (*f*), costs were refused on a writ of error to reverse a recovery. However, in *Ferguson* v. *Rawlinson* (*g*), it was decided that the plaintiff in a qui tam action was entitled to costs; and it must be admitted, that since

in parliament, it was held that the Court of King's Bench could not order the Master to allow the costs in parliament. *Beale* v. *Thompson*, 2 Maule & Selw. 249.

(*a*) The 3 *H.* 7, c. 10, recites, "that where oftentimes plaintiffs or demandants that have judgments to recover, be delayed of execution, for that the defendants or tenants against whom judgment is given, or other that have been bound by the said judgment, sueth a writ of error to annul and reverse the said judgment, to the intent only to delay execution of the said judgment;" and enacts, "that if any such defendant or tenant, or if any other that shall be bound by the said judgment, sue, afore execution had, any writ of error to reverse any such judgment, in delaying of execution, that then if the said judgment be affirmed good in the said writ of error, and not erroneous, or that the said writ of error be discontinued in the default of the party, or that any person that sueth such writ of error be nonsued in the same, that then the said person against whom the said writ of error is sued shall recover his costs and damage, for his delay and wrongful vexation in the same, by discretion of the justice afore whom the said writ of error is sued."

(*b*) "It seems that it does extend to cases in which the plaintiff is not entitled to costs in the original action; *Ferguson* v. *Rawlinson*, Andr. 113; 2 Str. 1084; (accord. Cro. Eliz. 616,) overruling *Smith* v. *Smith*, Cro. Car. 425; *Winne* v. *Lloyd*, 1 Lev. 146; Raym. 134, contrà." 1 Chitt. Stat. 274, (f.)

(*c*) Dyer, 76 b.

(*d*) Cro. Eliz. 616.

(*e*) Cro. Car. 425.

(*f*) 1 Lev. 146; Raym. 134.

(*g*) Andr. 113; 2 Str. 1084.

that decision the statute has been considered as applying to all cases; so that, perhaps, it cannot now be successfully contended, that the defendant in error in this case is not entitled to costs under the statute 3 *H.* 7, c. 10. But the present application does not stop there, for it is contended on the part of this defendant in error, that he is entitled to *double* costs under the statute 13 *Car.* 2, st. 2, c. 2, s. 10 (*a*). To these it is submitted he is clearly not entitled, as this statute extends only to writs of error *after verdict*, which must mean writs of error on a judgment founded on a verdict; whereas this writ of error is not on the judgment founded on the verdict of the jury, but on the judgment founded on the facts admitted by the demurrer to the eighth plea. This is, therefore, not a writ of error "after verdict" within the fair meaning of those words, as applied in the statute. Besides, the statute is directed only against vexatious writs of error (*b*), brought for the purpose of delaying execution upon judgments after the jury have decided a question of fact, and not against a case like the present, which involved a serious and important question of law.

Cross, Serjt. contrà. It is conceded that the defendant in error is entitled to his ordinary costs under the statute of *Henry* 7, and it is equally clear that he is entitled to double costs under the statute of *Charles* 2. The latter statute is general in its terms, for it speaks of "any writ of error for reversal of any judgment whatsoever, given after any verdict." That it refers to vexatious writs of error is true; but it comprehends all writs of error after verdict; and

(*a*) Which enacts, "that if any person shall sue or prosecute any writ of error, for reversal of any judgment whatsoever given, after any verdict, in any of the Courts aforesaid, and the said judgment shall afterwards be affirmed, then every such person shall pay unto the defendant in the said writ of error, his double costs, to be assessed by the Court where such writ of error shall be depending, for the delaying of execution."

(*b*) The statute is intituled "An act for prevention of vexations and oppressions by arrests, and of delays in suits of law."

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every writ of error, brought after verdict, must be deemed vexatious. In this case, it appears by the record, that the writ of error was brought after a verdict found upon the issues in fact, and therefore it falls most strictly within the scope of the statute.

The Court took time to examine the assignment of errors, and to consider of their judgment, which was afterwards thus delivered by

Lord TENTERDEN, C. J.—We have examined the assignment of errors in this case, and find the first to be, that the count or declaration is insufficient. Upon that ground, had it been well founded, the judgment ought to have been reversed, notwithstanding the verdict. The writ of error, therefore, was brought for the reversal of a judgment after verdict, within the meaning of the statute 13 *Car.* 2, st. 2, c. 2, s. 10, and is not as if it had been brought merely to reverse the judgment on the demurrer to the replication. This rule, therefore, must be made absolute.

Rule absolute.

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A broker, who has possession of a policy, which he effected, and on which he has a lien, is compellable to produce it under a subpœna duces tecum, on the part of the assured, on the trial of an action against the underwriters.

And he is a competent witness, notwithstanding his lien, to prove all matters connected with the policy.

Policy of insurance on goods by ship "at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port of discharge in Europe, with leave to touch, stay, and trade at all or any ports and places whatsoever and wheresoever in the East Indies, Persia, or elsewhere, &c., beginning the adventure upon the goods from the loading thereof on board the ship as above." The ship took in some goods at Batavia, then went to Sourabaya, a port in the East Indies, but not in the direct course from Batavia to Europe, and took in other goods, then returned to Batavia, and afterwards sailed from thence for Europe, and was lost by perils of the sea. Held, that the going to Sourabaya was no deviation, and that the goods taken in there were protected by the policy.

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the ship's port or ports of discharge in Great Britain, or to any port or ports in the United Netherlands, or to Altona or Hamburgh, or to all or any, with leave to touch, stay and trade, at all or any ports and places whatsoever and wheresover, in the East Indies, Persia, or elsewhere, as well beyond as at and on this side of the Cape of Good Hope, in port or at sea, at all times and in all places, and until safely arrived and landed at the ship's final port or place of discharge; upon any kind of goods and merchandize, and also upon the body, &c., of the good ships or vessels called the *Albion*, *Bolivar*, *Java Packet*, and *Blose*, beginning the adventure upon the said goods and merchandize from the loading thereof on board the said ships as above, with leave to call at or off any ports or places in Great Britain, and wait for orders, &c. And it should be lawful for the said ships, &c., in that voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever and wheresoever, in any direction, and for any purpose, necessary or otherwise, particularly Singapore, Penang, Malacca, Batavia, the Cape of Good Hope, and St. Helena, with leave to take on board, discharge, reload, or exchange goods and passengers, without being deemed any deviation from, and without prejudice to that insurance. By a memorandum, the policy was declared to be on goods, as interest might appear, with leave to declare the same thereafter. Averment: that afterwards, to wit, on &c., the interest in the said goods and merchandize so intended to be insured by the said policy, was duly declared to be all in the *Java Packet* on coffee, and that the defendant subscribed the policy for 300*l.*, at a premium of 6*l.* 6*s.* per cent. That afterwards, to wit, on &c., at Batavia, in the policy mentioned, coffee to the value of 10,000*l.* had been and was shipped and loaded in and on board of the said ship called the *Java Packet*, to be carried therein on the voyage in the policy mentioned, to wit, towards and unto Antwerp, being a port in the United Netherlands; and that also afterwards, to wit, on &c., to wit, at Sourabaya,

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being a certain port or place which the said ship proceeded and sailed to, and touched and stayed at, under and by virtue of the said policy, to take on board other goods, divers other goods, to wit, 10,000 peculs of coffee, and 10,000 bags of coffee, of great value, had been shipped and loaded in and on board of the said ship, to be carried and conveyed therein to Antwerp aforesaid. Averments of interest, and of a total loss by perils of the sea. Plea: non assumpsit. At the trial, before Lord *Tenterden*, C. J., at the London adjourned sittings after Hilary term, 1828, the broker who had effected the insurance, and who had been served with a subpœna duces tecum to produce the policy, was called as a witness on the part of the plaintiffs for that purpose, but objected to produce it, on the ground that he had a lien upon it, for premiums advanced, the value of which would be lost by his producing the policy, as it would no longer be the interest of any one to take it up. Lord *Tenterden*, however, was of opinion that the witness was bound to produce the policy, and that he would not thereby be deprived of his lien. It was then objected on the part of the defendant, that the witness, having a lien, was interested, and therefore incompetent, and that he could not be examined. Lord *Tenterden* overruled the objection, and the witness was examined. The jury found a special verdict, in substance as follows:—

The policy of insurance mentioned in the declaration was effected by *John M'Allan*, as agent for the plaintiffs, and was subscribed by the defendant for 300*l.* The interest intended to be insured was duly declared, to be all in the *Java Packet*, on coffee. At Batavia, coffee to the value of 923*l.* 3*s.* 6*d.* was loaded on board that vessel, by the plaintiffs, to be carried to Antwerp. Batavia is a port in the island of Java, which is one of the islands in the East Indies. The vessel proceeded from Batavia to Sourabaya, which is another port in the island of Java, where coffee to the value of 5865*l.* 16*s.* 6*d.* was loaded on board her by the plaintiffs, to be carried to Antwerp. The

total value of the coffee loaded on board at Batavia and Sourabaya was 6292*l.* 6*s.*; the amount insured by the policy was 7500*l.*; no other goods were shipped by the plaintiffs on board the vessel, in respect of the insurance effected by the policy. The vessel returned from Sourabaya to Batavia, and afterwards sailed from Batavia for Antwerp. Sourabaya is not in the direct course from Batavia, Singapore, Penang, or Malacca to Europe, nor in the direct course from any one to any other of those four places, but is directly out of the course from each of those four places to Europe, and from each of those four places to any other of them, and is distant from Batavia four hundred miles eastward. Singapore, Penang, Malacca, and Batavia are not, according to the order in which they are mentioned in the policy, in the direct course of a voyage therefrom to Europe; but the direct course of a voyage from those four places to Europe, is according to the following order:—Penang, Malacca, Singapore, and Batavia. Any port or place in Persia is more than 1000 miles out of the course from any one of those four places to Europe. The whole of the coffee was the property of the plaintiffs, who were interested therein, as mentioned in the declaration. The vessel was, before her arrival at Antwerp, wholly lost by perils of the sea, and the coffee thereby wholly lost to the plaintiffs.

In Easter term, 1828, *F. Pollock*, on behalf of the defendant, moved for a rule nisi for a nonsuit or a new trial, on two grounds: first, that the broker ought not to have been compelled to produce the policy; and, secondly, that he was not a competent witness. First, the broker was not bound to produce the policy. He had a lien upon it, and he had a right, at his own discretion, to refuse to exhibit it, until that lien was satisfied. It was for him to determine, whether it was prudent to submit the instrument to the inspection of the plaintiffs, as it might turn out to be utterly worthless. [Lord *Tenterden*, C. J. Then he

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would have made a worthless paper the means of obtaining a large sum of money.] He was entitled to render his security available if he could. [*Bayley*, J. Suppose I have a lien on goods in my custody, and the owner wishes to shew them to a customer, or to inspect them for the purpose of ascertaining their value, can I refuse him this?] There is no case which decides that a party so situated is compellable to produce the goods. A lien is a right to keep the goods or papers of another, and to compel payment of a debt, by reason of the inconvenience to which the owner may be thereby put. The owner of a document, upon which another has a lien, may wish to inspect it, in order to judge whether it is worth his while to redeem it; but it seems no more than just that the party claiming the lien should have it in his power to exercise his paramount right by denying the inspection. The contract between the parties upon which a lien arises, is, that the one shall keep the goods until his lien be satisfied by the other. [*Bayley*, J. But the production of a document, as evidence, does not take it out of the possession of the witness.] Its production puts it into the possession of the Court. The case of *Lord* v. *Wormleighton* (*a*), seems much in point. In that case the defendant having died, his solicitor claimed a lien for his costs upon the papers in the cause, which had been revived against the executors of the defendant, who employed another solicitor. The executors moved, that the former solicitor might be ordered to permit an inspection of the papers, and to produce them when necessary for the purposes of the cause. Lord *Eldon*, C. said, "I think it would be a greater hardship on him, to make him produce them, than on the client to refuse it. My present impression is, that he ought to be able to make use of the non-production of the papers in order to get at what is due to him;" and his lordship having afterwards conferred with the Master of the Rolls and the Vice Chancellor, in order that the point might be settled, refused to make the order

(*a*) 1 Jacob, 480.

prayed. Secondly, the broker was not an admissible witness. (Here he was stopped by the Court.)

Lord TENTERDEN, C. J.—We are all of opinion that the broker was compellable to produce the policy, notwithstanding his lien upon it. The case cited was essentially different from the present. That was an application to the *discretion* of the Lord Chancellor; a discretion always exercised in the way most likely to do justice between the parties. In this case the witness came into Court under a subpœna duces tecum, a writ which the party requiring the production of a document has a *right* to take out, and to insist that it shall be obeyed. The policy having been once brought into Court, if we were to allow the broker to withhold it on account of his lien, we should permit that which would work great inconvenience and injustice, and should enable brokers to assist the underwriters in defeating the just claims of the assured. We do not, by this decision, deprive the party of his lien; he still has the policy in his possession, and has the same right in respect of it as before. Whether the broker was a competent witness, is a question worthy of further consideration; and upon that there may be a rule to shew cause.

BAYLEY, J.—The lien of an attorney is different from liens in general, as there is an understanding between him and his client, that if the client shall think proper to change his attorney, the papers shall be retained until the bill of costs is paid. The attorney looks not so much to the *value* of the papers he holds to secure payment, as to the *inconvenience* that may be produced by his detaining them until his bill is paid; but where goods or papers are in the hands of an ordinary creditor, there is no understanding that he is to have more than the *possession*, and the producing those goods or papers to the owner, or to a third person, or in evidence at a trial, does not take them out of his possession. The distinction between the two cases is

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this, that in the one the *value* is the security for the debt, and in the other the *inconvenience.*

LITTLEDALE, J.—Whether the witness was entitled to the lien which he claimed, it seems to me it was not for the Court to inquire. He claimed a lien upon a document he had in his possession, and which he objected to produce, unless the Court would impose terms upon the party calling for it. I think it was not in the discretion of the Court to impose any terms, but that the witness was bound to produce the policy under the subpœna duces tecum. If it were held that a witness ought under such circumstances to have his lien discharged, it might be impossible to ascertain the amount of it at the moment in a satisfactory manner; and at all events, long and irregular discussions would arise. Or the plaintiff might be nonsuited, and the statute of limitations, or some other matter, set up in defeat of a future action, and the broker would have it in his power to prevent the success of the plaintiff whenever he thought proper.

PARKE, J.—A lien is a mere right of possession, and does not relieve the party claiming it from the necessity of producing the instrument which he holds, when regularly required to do so for the purposes of a cause. The lien of carriers, of manufacturers, of warehousemen, or wharfingers, gives them only a right of possession; and the owner of the goods may inspect them himself, or shew them to others, so long as he does nothing to interfere with that possession. The case cited is applicable only where a solicitor is called upon to produce papers; and the true distinction between that case and the present has been pointed out by the Court.

Rule refused on the first ground.

Rule nisi granted on the second ground; against which

Scarlett, A. G., *Campbell*, and *Joshua Evans* now shewed

cause. The single question now before the Court is, whether the broker, having a lien on the policy, was a competent witness. If he is incompetent, no attorney or agent can be a competent witness for his employer. Every attorney has a lien upon the judgment obtained by his client, not merely for the costs of the particular action, but for his general bill of costs; but that has never yet been held to render him incompetent. Now the broker has a lien, not upon the judgment, but upon the policy only, therefore his interest is much more remote than that of the attorney. Indeed, he has no direct legal interest in the event of the suit, and consequently he is competent. In *Dixon* v. *Cooper* (*a*), a factor who sold for the plaintiff, and was to have a shilling in the pound for himself, was held a competent witness to prove the contract and sale. So, in *Benjamin* v. *Porteus* (*b*), a person who was employed to sell goods, and was to have for himself whatever money he could procure for them beyond a certain sum, was held a competent witness to prove the contract between the seller and the buyer. Besides, servants and agents are, in all cases, competent witnesses ex necessitate. *Barker* v. *Macrae* (*c*).

F. Pollock, Maule, and *Patteson,* contrà. The broker in this case cannot be considered as a witness ex necessitate, for he was not called to prove a mere matter of form, necessarily within his knowledge as agent, but to prove the substantive allegation in the declaration of the interest of the plaintiffs in the goods insured. In *Gevers* v. *Mainwaring* (*d*), in an action against the principal for negligence and misconduct in a purchase, the broker, who made the contract for him, was called to prove that there was no negligence or misconduct; and it was held that he was not competent without a release from his principal. [*Parke,* J. There the verdict would have been evidence against him.] The lien claimed in this case was not of the ordi-

(*a*) 3 Wilson, 40.
(*b*) 2 H. Bl. 590.
(*c*) 3 Campb. 144.
(*d*) Holt, N. P. C. 139.

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nary nature, and the witness admitted that he looked for payment of his claim solely to the funds to be derived from the action. [Lord *Tenterden*, C. J. Suppose an attorney admitted that his client could not pay his costs unless he recovered a verdict, would that render him incompetent?] Even witnesses ex necessitate may be incompetent by reason of their interest. Where the interest of the witness may be got rid of by the payment of money due to him, that ought to be done. If a servant, for instance, is incompetent by reason of wages being due to him, the master ought to pay him, and so destroy his interest, before he has the benefit of his evidence. So here, the plaintiffs ought to have paid the broker what was due to him, and then there would have been no objection to his testimony.

Lord TENTERDEN, C. J.—We have already decided that the broker in this case was compellable to produce the policy itself; and I am also of opinion that he was competent to prove the facts and circumstances connected with the policy. I cannot distinguish this case from that of an attorney who has a lien upon the judgment. Besides, the broker here was a witness ex necessitate, for he made the contract between the parties. In *Benjamin* v. *Porteus* (*a*), a factor was, under such circumstances, admitted to prove the contract, although he was to be paid according to the price obtained for the goods.

BAYLEY, J.—The plaintiffs might, by paying off the broker's demand, have destroyed his interest and removed all objection to him; but I do not think they were bound to do so. He was a witness ex necessitate, and as such the plaintiffs were, notwithstanding his interest, entitled to his evidence, so far as the necessity extended.

LITTLEDALE, J.—I am of the same opinion. The broker was the agent of both parties, for they had both em-

(*a*) 2 H. Bl. 590.

ployed him in the management of the policy; neither of them, therefore, can be permitted to object to his competency to prove the matters connected with the policy.

PARKE, J.—I think the broker was a competent witness. The first objection is, that he was a creditor of the plaintiffs; but I cannot see that the defendant has any thing to do with that. Next, it is said that he was interested as agent; but it is clear that an agent is admissible ex necessitate rei to prove all matters relating to a contract made by himself. Lastly, it is said, that he had such a special interest in the policy as rendered him incompetent. If he had been the assignee or mortgagee of the policy, that objection might have been available, but that did not appear to be the case; he had a mere lien; and an attorney, though he has a lien on the judgment, is competent; and I take the reason of the rule to be, that whatever may be the result of the action, his legal rights remain the same. If he looks to the judgment alone for payment, that may affect his credit, but not his competency.

Rule discharged.

The special verdict was now argued by

Joshua Evans, for the plaintiffs. Two objections will, it is supposed, be taken to the plaintiffs' right to recover—first, that the going to Sourabaya was a deviation; and secondly, that the coffee there taken on board was not protected by the policy. The fate of both those objections will depend upon the construction to be put upon the policy. The rule of construction, as laid down by Lord *Ellenborough* in *Robertson* v. *French* (*a*), and cited with approbation by Lord *Tenterden* in *Lang* v. *Anderdon* (*b*), is this—that the words of a policy are to be construed in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of

(*a*) 4 East, 130. (*b*) 5 D. & R. 397; 3 B. & C. 500.

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trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense. The description of the voyage in the present policy is—"at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port or ports of discharge in Great Britain, or to any port or ports in the United Netherlands, or to Altona or Hamburgh, or to all or any, with leave to touch, stay, and trade at all or any ports and places whatsoever and wheresoever in the East Indies, Persia, or elsewhere, as well beyond as at and on this side of the Cape of Good Hope." Such a description clearly proves that the parties contemplated what may be termed a roving or seeking voyage; and independently of authorities, it is difficult to understand how any serious doubt can be suggested, of the run to Sourabaya being within the "leave" given by the policy. Nor does there seem any reason to doubt that the coffee taken on board at Sourabaya was protected by the policy. After the enumeration just adverted to, of the places at which the vessel was at liberty to touch, stay, and trade, the policy proceeds thus—"beginning the adventure upon the said goods and merchandize from the loading thereof on board the said ships *as above;*" which can only mean a loading at any of the ports or places above mentioned, as those at which the vessel was at liberty to touch, stay, and trade. It may be said that the vessel ought to have gone to the several places mentioned in the policy in their geographical order, and could only touch at other places in so doing. [Lord *Tenterden*, C. J. That surely will not be contended, after the finding in the special verdict upon that subject.] If it should, the Court has anticipated the short but conclusive answer, which is, that it is impossible to go to those places in the order in which they are mentioned in the policy. Without authorities then, the natural and obvious meaning and construction of the policy

is clearly in favour of the plaintiffs; but in case of any doubt upon that point, the authorities are as clearly in their favour. In *Bragg* v. *Anderson* (*a*), it was held that a policy "at and from Martinique, and all and every the West India Islands," warranted a course from Martinique to islands not in the direct homeward voyage. *Lambert* v. *Liddard* (*b*), *Mellish* v. *Andrews* (*c*), and *Metcalfe* v. *Parry* (*d*), are all decisions to the same effect; for it was held in all those cases, that vessels touching at places out of the direct course of their voyage from the ports where the policies attached, were protected by those policies; and the policy in this case is quite as general in its terms and comprehensive in its operation, as any one of those referred to. As to the object of the vessel's going to Sourabaya, it is clear that she went thither bonâ fide in the prosecution of the adventure, and with a view to the ultimate accomplishment of the voyage to Europe, and therefore she was protected; *Warre* v. *Miller* (*e*), *Bottomley* v. *Bovill* (*f*). Secondly, the coffee taken on board at Sourabaya was protected by the policy. Upon this point there are some cases which will probably be relied on for the defendant, but they are all distinguishable from the present. In *Hodgson* v. *Richardson* (*g*), a policy "at and from Genoa" was held not to cover goods previously laden at Leghorn; but that was upon the ground that there had been a concealment of the true port of loading, which vitiated the policy. In *Spitta* v. *Woodman* (*h*) it was held, that "if a policy be effected on goods on a voyage defined from A. to B., the risk to commence 'at and from the loading thereof on board,' not saying where, it must be intended a loading at the place at which the voyage commenced." And in *Mellish* v. *Allnutt* (*i*) there was a

(*a*) 4 Taunt. 229.
(*b*) 5 Taunt. 480; 1 Marsh. 149.
(*c*) 5 Taunt. 496; 2 M. & S. 27; 16 East, 312.
(*d*) 4 Campb. 123.
(*e*) 7 D. & R. 1; 4 B. & C. 538; 1 C. & P. 237.
(*f*) 7 D. & R. 702; 5 B. & C. 210.
(*g*) 1 W. Bl. 463.
(*h*) 2 Taunt. 416.
(*i*) 2 M. & S. 106.

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similar decision upon precisely the same principle. The distinction between all these cases and the present is, that here the policy, after enumerating the various places at which the vessel may touch, declares that the risk shall commence from the loading of the goods *as above*; clearly meaning, a loading at any of the places before enumerated. The rule of construction adopted in the cases last referred to, has been since considered as one not to be favoured or extended (*a*); and any circumstance, however slight, will suffice to take a case out of it. Thus, in *Gladstone* v. *Clay* (*b*), the introduction of the word "wheresoever," after the words "from the loading thereof on board the ship," was held sufficient for that purpose. But the case of *Violet* v. *Allnutt* (*c*), is expressly in point for the present plaintiffs, for it was there held, that liberty to touch at a port for any purpose whatever, includes liberty to touch for the purpose of taking on board part of the goods insured; and that holding was confirmed in *Barclay* v. *Stirling* (*d*), which was to the same effect, except that there the insurance was on freight instead of goods.

Patteson, contrà. There are three objections to the plaintiffs' right to recover in this case—first, the vessel never sailed on the voyage insured; secondly, if she did sail on that voyage, the going to Sourabaya was a deviation; and thirdly, the policy does not cover the goods taken on board at that place.

First—The voyage insured was "at and from Singapore, Penang, Malacca, and Batavia, *all or any*, to the ship's

(*a*) See the observations of Lord *Ellenborough* on the decision in *Spitta* v. *Woodman*, in *Bell* v. *Hobson*, 16 East, 240.

(*b*) 1 Maule & Selw. 418.

(*c*) 3 Taunt. 419. The policy there was on goods at and from Plymouth to Malta, with liberty to touch at Penzance, or any port in the Channel to the westward, for any purpose whatever, "beginning the adventure from the loading of the said goods on board the said ship *as above*:" and it was held, that goods loaded at Penzance were protected by the policy. And see *post*, 541, 542.

(*d*) 6 Maule & Selw. 6.

port or ports of discharge in Great Britain, or to any port or ports in the United Netherlands, or to Altona or Hamburgh, or to all or any." There the description of the voyage ends. The words which follow, "with leave to touch, stay, and trade," &c., form no part of the description of the voyage; they merely give a liberty to touch at the places there mentioned, without the doing so being deemed a deviation from the voyage before described as the object of the insurance: the voyage insured was to commence from one of the four places originally named. If those places were not to be considered as distinguished from the other places mentioned in the general words, for some purpose or other, there seems no reason for mentioning them at all; and the only imaginable purpose for which they could be intended to be so distinguished is, that one of them should form the terminus a quo the voyage to Europe should commence. Now the ship did not sail from any one of those four places on a voyage to Europe; she sailed from Batavia to Sourabaya, four hundred miles out of the course of a voyage from Batavia to Europe, for the purpose of procuring a cargo. She did not, therefore, sail on the voyage insured at all, consequently the policy was discharged; *Wooldridge* v. *Boydell* (*a*), *Way* v. *Modigliani* (*b*). *Bottomley* v. *Bovill* (*c*), which was cited on the other side, belongs to a class of cases very different from the present. That was a policy on a voyage from London to New South Wales *and back* (*d*), with liberty to go to certain places in the

(*a*) 1 Dougl. 16, where it was held, that if a ship insured for one voyage sails upon another, though she is taken before reaching the dividing point between the two voyages, the policy is discharged.

(*b*) 2 T. R. 30, where it was held, that if a ship, insured from a certain time, sails before that time on a different voyage from that insured, the assured cannot recover, though she afterwards get into the course of the voyage described in the policy, and is lost after the day upon which the policy was to have attached.

(*c*) 7 D. & R. 702; 5 B. & C. 210.

(*d*) The policy in that case was *not* from London to New South Wales *and back*. It was "from London to New South Wales, and from thence to all ports and places

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East Indies. The vessel did sail from London to New South Wales, and the question in the cause arose upon a subsequent loss (*a*). But the present was not an insurance on a voyage out and home, to the East Indies and back, but at and from four particular places named in the policy, or any of them, to Europe. The argument on the other side must go this length—that if the vessel had taken in the whole of her cargo at Sourabaya, and had never gone to any one of the four places named, the policy would still have attached; for that argument in substance and effect is, that all the places included in the leave to touch, &c., are embodied in the description, and made parts of the voyage insured. Unless that is so—unless the policy would attach even under those circumstances—it is quite immaterial that the vessel had been at Batavia before she went to Sourabaya, because she did not go there in the course and for the prosecution of her voyage to Europe, but out of her course and for a different purpose, namely, to take in goods and then to return to Batavia. In order to protect such a course, the policy should have been "at and from Java," not "at and from Singapore," &c.

Secondly, if the ship did sail upon the voyage insured, and the policy ever attached at all, the going to Sourabaya was a deviation by which it was at once discharged. The permission to touch and stay at ports and places in the East

in the East Indies, or South America, with liberty to take in and land goods and passengers, and to *trade* backwards and forwards, and forwards and backwards; premium 80*s.* per cent., to return 29*s.* 6*d.* *if the voyage ends at New South Wales*, and 15*s.* 6*d.* *if the voyage ends at South America.*" On arriving at New South Wales, the captain was ordered by the owners to proceed on a *trading* voyage to New Zealand, *and from thence direct to South America.* He proceeded to New Zealand with *passengers*, and was *returning from thence to New South Wales*, when the ship was totally lost. It was held, that the sailing from New South Wales to New Zealand *and back*, was a deviation from the voyage insured, by which the insurers were discharged; 7 D. & R. 702. It seems difficult to see how that decision has any bearing upon the principal case on one side or the other.

(*a*) See the last note.

Indies and elsewhere, means only a touching or staying in the course and prosecution of the voyage insured, which was, a voyage at and from Singapore, Penang, Malacca, and Batavia, all or any of them, to Europe; whereas the touching and staying at Sourabaya was not in the course or prosecution of a voyage from Batavia to Europe, but of a voyage from Batavia to Sourabaya *and back*.

Thirdly, the goods shipped at Sourabaya are not protected by the policy. The expression, "beginning the adventure upon the said goods and merchandize, from the loading thereof on board the said ships *as above*," refers to the description before given of the voyage, to the four specified places, at and from which the goods were insured; and, in order to be covered by the insurance, the goods must have been loaded at one of those four specified places. In *Spitta* v. *Woodman*, (*a*), the insurance was on goods on a voyage at and from Gottenburgh to the ship's port of discharge in the Baltic, beginning the adventure, "from the loading thereof on board the said ship;" and it was held to cover only such goods as were loaded at Gottenburg. The absence in the policy there of the words "as above," and their presence here does not vary the cases, for those words cannot extend the operation of the instrument. The policy in this case would have been equally extensive if it had omitted those words, and had stated only, in general terms, that the adventure on the goods should commence from the loading of them on board the ship; and in that view of this case, *Grant* v. *Parton* (*b*), *Spitta* v. *Woodman* (*c*), *Constable* v. *Noble* (*d*), and *Mellish* v. *Allnutt* (*e*), are direct authorities in favour of the defendant. Nor is *Gladstone* v. *Clay* (*f*), an authority against him, because there the policy was made to attach upon the goods "*wheresoever*" loaded, upon the insertion of which one word that whole case turned, and which wholly distinguishes it from the present. In

(*a*) 2 Taunt. 416.
(*b*) 1 Taunt. 463.
(*c*) 2 Taunt. 416.
(*d*) 2 Taunt. 403.
(*e*) 2 M. & S. 106.
(*f*) 1 M. & S. 418.

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Grant v. *Delacour* (*a*), the policy was on goods on a voyage from London to the East Indies and back, beginning the adventure on the goods "from the loading thereof on board the said ship at London." That was held to protect goods not loaded on board at London, and necessarily so, for to hold otherwise would have been to decide that the policy applied only to goods carried from London to India, and brought back again from India to London; which would have been absurd on the face of it. The only cases that can at all be regarded as authorities for the plaintiffs are those of *Violet* v. *Allnutt* (*b*), and *Barclay* v. *Stirling* (c). As to those it is enough to say of the first, that it was but little considered, and that the goods there were taken on board in the prosecution of the voyage insured; of the second, that it was decided entirely upon the authority of the first, and that there also the goods were taken on board while the vessel was prosecuting the voyage insured.

The Court took time to consider of their judgment, which was afterwards delivered by

Lord TENTERDEN, C. J., who, after stating the facts found by the special verdict, thus proceeded. It is obvious, on the perusal of this policy, (in which so many places of departure and four ships are mentioned, with liberty to declare and specify the particular ship and goods afterwards,) that at the time of the insurance the assured must have been ignorant of the particular port in the East at which goods for them would be shipped, as well as of the name of the ship and the species of the goods; and must, therefore, have intended to protect themselves from loss, whatever might be the sort of goods, by whichsoever of the four ships such goods might be sent, and at whatsoever place or places in the East they might be put on board: and the defendant, by subscribing such a policy, must be understood to have intended to afford a protection equally extensive, if the terms

(*a*) 1 Taunt. 466.
(*b*) 3 Taunt. 419.
(c) 5 M. & S. 6.

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of the policy will admit of such an effect being given to the instrument.

The rule for the construction of marine policies is very well laid down by Lord *Ellenborough* in the case of *Robertson* v. *French* (*a*), which was cited in the argument. His lordship there said, "In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of insurance, which are not equally applicable to the terms of other instruments, and in all other cases; it is therefore proper to state on this head, that the same rule of construction applies equally to this instrument of a policy of insurance; namely, that it is to be construed according to its sense and meaning, as collected, in the first place, from the terms used in it; which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect of the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or, unless the context evidently points out that they must, in the particular instance and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense."

Such, then, being the object of the assured, and such the rule of construction, we are to look to the policy, in order to gather from thence whether or no the whole or any part of the plaintiffs' interest can, consistently with such decisions as have taken place on similar subjects, be considered as protected. The plaintiffs contend that their entire interest, as well in the goods shipped at Sourabaya as in those shipped at Batavia, is protected: the defendant insists that no part is protected; or, supposing the goods shipped at Batavia to be protected, that the shipment at Sourabaya is not. The grounds on which it was contended that no part was protected were, first, that the policy did not attach; the goods shipped at Batavia being, as it was urged, shipped, not for a voyage to Antwerp, but for a voy-

(*a*) 4 East, 130.

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age to Sourabaya and back to Batavia; from whence a distinct voyage to Antwerp commenced. Secondly, that, supposing the policy to have attached on those goods while the ship remained at Batavia, yet the voyage to Sourabaya was a deviation. The ground on which it was contended that the goods shipped at Sourabaya were not protected, was, that Sourabaya could not be considered as a port of loading, or terminus a quo, within the meaning of the policy.

We are of opinion that the goods shipped at Batavia were in reality shipped for a voyage to Antwerp by way of Sourabaya, and that the ship's first departure from Batavia was on such a voyage. And considering the very extensive powers given by this policy, both in the first and last clauses, we think the sailing to Sourabaya was not a deviation; it could not be so deemed without a direct contradiction to the terms of the policy, it being clear that the ship sailed to Sourabaya for the purpose and in the prosecution of the original adventure contemplated by the policy. Upon these points the principle of the decision in *Mellish* v. *Andrews* (*a*), is applicable to the present policy; the only difference between the two case sbeing, that in *Mellish* v. *Andrews*, the places of *discharge or termination* of the voyage, and the course of sailing for that purpose, were left undefined, by reason of the uncertain state of commerce in the Baltic; and in the present case the places of *shipment or commencement* of the voyage, and the course of sailing for that purpose, are left undefined, by reason of the ignorance of the assured as to those particulars. The order in which the four places named stand in the policy, shews plainly that a voyage in the direct geographical or nautical course was not thought of, it being clear that it was thought possible that goods might be laden at each of those places.

With regard to the goods shipped at Sourabaya, the question is, whether that place can be considered as a loading port or terminus a quo within the meaning of the policy.

(*a*) 5 Taunt. 496; 2 M. & S. 27; 16 East, 312.

Sourabaya is certainly a place in the East Indies, and so within the meaning of the words used in that part of the policy wherein the voyage is described. But it is said that the words "ports and places in the East Indies, Persia, or elsewhere," not following directly after the four places first named as the termini a quibus, but after the places named as the termini ad quos, and being introduced by the words "with leave to touch, stay, and trade," cannot be understood to designate places of shipment; but only places to which the ship might be permitted to sail for some other purpose. On the other hand, it was contended that those words might, according to two decided cases which I shall presently mention, be considered as designating places of shipment, and that in this particular policy they must be so considered, because the places to which the ship might sail without deviation or prejudice to the insurance, are afterwards mentioned and provided for by the policy in a distinct clause, of which the language is more loose and comprehensive than the language of the first clause. Now, if we suppose that a shipment of goods by the plaintiffs at some place that might be imagined, as, for instance, on the coast of Brazil, would not be a shipment within the first clause, and so not be protected by the policy; but that, nevertheless, if the ship, after receiving the plaintiffs' goods, had sailed for that coast for some other lawful purpose, the benefit of the policy would have been saved by virtue of the latter clause; the two clauses will have each a distinct and appropriate sense. And without determining what effect the latter clause might have on a question as to the places of shipment, we are clearly of opinion that the words "ports and places," &c., in the first clause may and ought to be understood as designating such places. And the two cases of *Violet* v. *Allnutt* (*a*), and *Barclay* v. *Stirling* (*b*), are plain authorities to shew that a place mentioned after the words "with leave to touch," &c., may be understood as designating a loading port. The first of those cases was an insurance on goods by a ship at and from Plymouth to Malta, with

(*a*) 3 Taunt. 419. (*b*) 5 M. & S. 6.

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liberty to touch at Penzance, or any port in the channel to the Westward, for any purpose whatsoever. The ship, after receiving some of the plaintiff's goods at Plymouth, sailed to Penzance, and there received other goods of the plaintiff; after which a loss happened. The only question was, whether the insurance attached on the goods shipped at Penzance. The verdict had been taken in respect of those goods; and the Court was clearly of opinion that the insurance did attach upon them, and refused even a rule nisi for setting aside the verdict.

The case of *Barclay* v. *Stirling* (*a*) arose out of an insurance on freight. The voyage described in the policy was, "at and from her port or ports of loading in Jamaica to her port or ports of discharge in the United Kingdom, with leave to call at all, any, or every one of the British and foreign West India Islands, to seek, join, and exchange convoy, beginning the adventure upon the goods from the loading thereof on board the said ship as aforesaid." In a subsequent part of the policy, after the usual declaration that it should be lawful for the ship in that voyage to proceed and sail to, and touch and stay at any ports whatsoever, the following words were introduced, "and wheresoever, with leave to discharge, exchange, and take on board goods at any ports or places she may call at or proceed to, without being deemed any deviation from and without prejudice to this insurance." That was an insurance, not on the goods of any particular person, but on the freight to be earned by conveying the goods of any person; but the question was the same as on a policy on goods. The ship took in a cargo at Jamaica, got on shore off the island of Cuba, and great part of her cargo was there lost. She was afterwards taken to the Havannah and repaired, and there took in some fresh goods for London; and the question was, whether the freight of these latter goods was protected by the policy. The Court held that it was protected, considering the policy to attach on the freight of goods laden at any intermediate

(*a*) 6 Maule & Selw. 6.

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place in the course of the voyage, and not to be confined to the freight of goods shipped at Jamaica.

For these reasons, and upon these authorities, we think the plaintiffs entitled to recover in respect of all their goods. No question was made as to the short interest, the actual value of the goods being less than the value mentioned in the policy; and therefore the judgment will be, that the plaintiffs recover the sum of 254*l.* 14*s.*

Judgment for the plaintiffs (*a*)

(*a*) On error brought, this judgment was affirmed; *Leathley* v. *Hunter*, 5 Moore & P. 457; 7 Bingh. 517; 1 Crompt. & Jerv. 423; 1 Tyrwh. 355; Dans. & Ll. 222; Ll. & Welsb. 125; 4 Nev. & Mann. 545.

The KING *v.* The SCRIVENERS' COMPANY.

A person who was bound apprentice to a notary for seven years, and during the whole of that term acted as a banker's clerk till five o'clock in the afternoon daily, and then went to the notary's office and employed the evening in presenting bills of exchange and preparing protests, is not a person who was not actually employed by the notary during the whole term, in the proper business of a notary, within the meaning of the statute 41 *Geo.* 3, c. 79, s. 7, and is not entitled to act as a notary.

Nor is such a person entitled to be admitted to the freedom of the Scriveners' Company, for the purpose of being enabled to apply for a faculty to practise as a notary, within s. 13 of the same statute.

MANDAMUS. This was a rule calling on the defendants, the incorporated Company of Scriveners of the City of London, to show cause why a writ of mandamus should not issue, directed to them, commanding them to admit *Alexander Fox Ridgway* to the freedom of the Company.

The affidavits upon which the rule nisi was granted, stated, in substance, as follows:—

That by an indenture of apprenticeship, dated 19 June, 1822, *Ridgway* had bound himself clerk or apprentice to one *Drake*, a notary public, to learn the art, trade, business, profession, or mystery of a notary-public and scrivener, to serve from the date of the indenture unto the full end and term of seven years; that *Ridgway* did, by virtue of the indenture, actually and really serve, and was employed by *Drake*, as his clerk or apprentice, for and during the whole time and term of seven years therein specified; that *Ridgway* being desirous on the expiration of his ap-

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prenticeship, to be sworn, admitted, and inrolled as a notary public, with a view of practising in such profession within the City of London and liberties thereof, *Drake*, on 25 June, 1829, made the affidavit of the due service of *Ridgway* under the indenture, to the purport and effect prescribed by the stat. 41 *Geo.* 3, c. 79, intituled "An Act for the better Regulation of Public Notaries in England" (*a*),

(*a*) By that Act, s. 1., reciting "that it is expedient for the better prevention of illiterate and inexperienced persons being created to act as, or admitted to the faculty of, public notaries, that the said faculty should be regulated," it is enacted, "that no person shall be created to act as a public notary, or use and exercise the office of a notary, or do any notarial act, unless such person shall have been duly sworn, admitted, and inrolled in manner hereinafter directed, in the Court wherein notaries have been accustomarily sworn, admitted, and inrolled."

By s. 2, "No person shall be sworn, admitted and inrolled as a public notary, unless such person shall have been bound by contract in writing, or by indenture of apprenticeship, to serve as a clerk or apprentice for and during the space of not less than seven years to a public notary, or to a person using the art and mystery of a scrivener, according to the privilege and custom of the City of London, such scrivener being also a public notary, duly sworn, admitted and inrolled, and that such person, for and during the said term of seven years, shall have continued in such service."

By s. 6, "No public notary, or scrivener being also a public notary, shall take, have, or receive any clerk or apprentice, who shall become bound as aforesaid, after such public notary, or scrivener being also a public notary, shall have discontinued or left off, or during such time as he shall not actually practise or carry on, the business of a public notary."

By s. 7, "Every person who shall become bound by contract in writing, or indenture of apprenticeship, to serve any public notary, as hereby directed, shall during the whole time and term of service to be specified in such contract or indenture, or during the time and space of seven years thereof at least, if bound for a longer term than seven years, continue *and be actually employed by such public notary, or scrivener being also a public notary, in the proper business, practice, or employment of a public notary.*"

By s. 13, reciting, that the incorporated Company of Scriveners of London, by virtue of its charter had jurisdiction over its members, being resident within the City of London, the liberties of Westminster, the borough of Southwark, or within the circuit of three miles of the said City, and had power to make good and wholesome laws and regulations for the government and control of such members

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that *Ridgway*, in order to enable himself to apply for a faculty, as directed by that act, on 29 July, 1829, applied to the Scriveners' Company, at a meeting of the said Company, to be allowed to take up the freedom of the said Company, as directed by the said act; but that on such occasion the said Company refused to admit *Ridgway* to the freedom of the said Company, without assigning any reason; and that, by reason of such refusal, *Ridgway* was prevented from applying, or founding any application, to the Court of Faculties, as prescribed by the said act.

The affidavits in answer to the rule contained the following statement:—

That the freemen of the science, art, or mistery of scriveners of the city of London, and suburbs thereof, were, by letters-patent of King *James* the First, bearing date the 28th of January, in the fourteenth year of his reign, incorporated by the name of the Master, Wardens, and Assistants of the Society of Scriveners of the City of London; that by the said letters-patent it was ordained, that at all times thereafter there should be one master and two wardens of the said Society, and twenty-five other persons of

and the said Company of Scriveners practising within the aforesaid limits, and that it is therefore expedient that all notaries, resident within the limits of the said charter, shall come into and be under the jurisdiction of the said Company, it is enacted, "that all persons who may hereafter apply for a faculty to become a public notary, and practise within the city of London and the liberties thereof, or within the circuit of three miles of the same city, shall come into and become members, and take their freedom of the said Company of Scriveners, according to the rules and ordinances of the said Company, on payment of such and the like fine and fees as are usually paid and payable upon the admission of persons to the freedom of the said Company, and shall, previous to the obtaining such faculty, be admitted to the freedom of the said Company, and obtain a certificate of such freedom, duly signed by the clerk of the same Company for the time being; which certificate shall be produced to the master of faculties, and filed in his office, prior to or at the time of issuing any such faculty to such person to enable him to practise within the jurisdiction of the said Company."

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the said Society, named assistants; that they, the master, wardens, and assistants of the Society, should make bye-laws for the better government of the Society; that they, the master, wardens, and assistants, had divers ancient rules by their predecessors established, and some others by themselves, for the better government of the Society, and, among others, the following:—"That no person thereafter should be enfranchised or admitted into the freedom or liberties of the said Society, to make open profession of the aforesaid science or art, until such time as he should have first been duly examined touching his sufficiency and ability to use and exercise the same, before the master, wardens, and assistants of the said Society, or any six of them, and should have been, by the said master, wardens, and assistants of the said Society, or such six of them as aforesaid, upon such examination, declared and approved to be of sufficiency and ability, and should have taken an oath as was thereinafter appointed:" That these bye-laws, and the oath thereby prescribed, were, with the other bye-laws of the master, wardens, and assistants, (in pursuance of an act of the 19 *Henry* 7,) duly approved and allowed by the Lord Chancellor and two Chief Justices in the 16 *James* 1; that they remained unaltered, and had from time to time been observed; that since the passing of the statute 41 *Geo.* 3, c. 79, the master, wardens, and assistants had, previously to the admission of any person applying for the freedom of the Society, for the purpose of obtaining a faculty to practise as a notary-public, required all such persons to produce evidence before them of the actual service of all such persons respectively to notaries-public for the full time and term of seven years, according to the tenor and effect, true intent and meaning of the said act. That at a Court holden on the 29th July then last, the indenture of apprenticeship between *Drake* and *Ridgway* was laid before the master, wardens, and assistants by *Ridgway*, and he then applied to be admitted to the freedom of the said Society, for the purpose of obtaining a

faculty to practise as a notary-public within the city of London and the liberties thereof; that being interrogated as to his service under the indenture of apprenticeship, he, in answer to several questions put to him by the master, wardens and assistants, stated, that previously to, and at the time of the execution of the indenture, and during the whole of the term of seven years mentioned in the indenture, he, *Ridgway* had been and then was a clerk in the service and employ of Messrs. *Hopkinsons*, bankers, in Regent Street; that the hours of business at their banking-house were from nine o'clock in the morning until five in the afternoon; and that he, *Ridgway*, had been accustomed to attend at the office of *Drake* to transact and be employed in the business of a notary after the hour of five o'clock in the afternoon of each day; that the master, wardens, and assistants, considering such alleged service colourable, and an evasion of, and contrary to the tenor and effect and true intent and meaning of the said act of 41 *G.* 3, c. 79, and calculated to defeat the intention thereof, by the admission of unqualified persons to the freedom of the said society, and thereby enabling them to obtain faculties as notaries-public, refused to admit him, *Ridgway*, to the freedom of the said society.

Campbell, *Denman*, C. S., and *Platt*, shewed cause. This rule must be discharged. The service with *Drake* the notary was merely colourable, and did not satisfy the requisitions of the act of parliament. The real service was with Messrs. *Hopkinsons*, the bankers. If this person is entitled to the freedom of the Company, every banker's clerk in the metropolis, who occasionally employs his evenings in presenting bills for payment, must be equally entitled. Unless every thing has been done which the act of parliament requires, the party is not qualified to be admitted to practise as a notary. Here *Ridgway* was bound apprentice to a notary for the term of seven years; but he did not "continue and be actually employed in the proper

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business and practice of a notary during the term of seven years;" which the seventh section of the statute expressly required him to do. A very small portion of his time daily was employed in the service of the notary; the great bulk of his time and attention was given to the business of the bankers. Such a course of life would not enable him properly to qualify himself for practising as a notary, and he must have been, therefore, one of those "inexperienced persons" whom, it is clear from the preamble of the act, it was the object of the legislature to exclude from so practising. The provision in this statute, as to service with notaries, is very similar to that in 22 *Geo.* 3, c. 46, s. 8, as to service with attorneys, which is, that every person bound to serve any attorney shall, during the *whole* term and time of service, continue and be actually employed by such attorney, in the proper business, practice, or employment of an attorney. Under that act it was held, that a clerk to an attorney, who, during the term for which he was bound, held the office of surveyor of taxes, could not be considered as having served his whole time and term in the proper business of an attorney, within the meaning of the act; *In re Taylor* (*a*). Now that case is precisely in point, therefore *Ridgway* has not duly qualified himself to practise as a notary, and the Court will not compel the Company to admit him to the freedom.

Scarlett, A. G. and *Manning*, contrà. First, the service with the notary was sufficient. The provision, that the clerk shall be employed in the business of a notary "during the whole time and term of service," does not mean that he shall be so employed every hour of every day, during the term for which he is bound; but that he shall be so

(*a*) 5 B. & A. 538. *S. C.* 6 D. & R. 428; 4 B. & C. 341. And see *Ex parte Hill*, 7 T. R. 456, where it was held, under the same act, that the clerk must actually serve the five years under articles, and that the statute was not complied with by the clerk serving part of the time with another attorney, though with his master's consent, and the rest of the time with his master.

employed during those hours in which the business of a notary is usually transacted. Now the business of a notary at the present time, whatever it may have been formerly, consists solely in presenting, during the evening after banking hours, such bills and notes as the drawers have refused to accept or pay during the day, and to prepare the protests in respect of them. The whole of that may be done, and in point of fact is done, during the evening, commencing after five in the afternoon, when the banking-houses close, and till when dishonoured bills and notes do not find their way from the bankers, or other holders, to the notaries. Therefore *Ridgway*'s employment with the bankers, during the morning, was perfectly consistent with his being employed by the notary for the remainder of the day, which comprised the usual and regular hours for transacting the business of a notary; and it is not denied that he was so employed regularly in the evening. Then, secondly, if he has served his apprenticeship pursuant to the provisions of the act, he is entitled, as of right, to be admitted to the freedom of the Company. The act is imperative. The Court of Assistants have but one thing to do, namely, to admit; they have no authority to examine the applicant as to his fitness. That power is vested in other hands; the Court of Faculties is the place where the qualifications of a party applying for a faculty are to be inquired into and judged of: and the admission to the freedom of the Company by the Court of Assistants does not enable the party to practise, but merely places him in a condition to present himself before the Court of Faculties, who are to decide whether he shall be allowed to practise or not. Upon both these grounds it seems clear that this rule ought to be made absolute.

Lord TENTERDEN, C.J.—I am of opinion that this rule ought to be discharged. The act of parliament cannot be considered as imperative upon the Company to admit any person who applies: the utmost effect we can give to it is

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to say, that it is imperative upon them to admit every person who has duly served such an apprenticeship as the act of parliament requires. The act requires that he shall, during the whole term, be in the employ of his master as a notary. It is conceded that Mr. *Ridgway* was a banker's clerk during the whole term, and employed as such daily until five o'clock in the afternoon; that after five o'clock in the afternoon he went to the office belonging to Mr. *Drake*, where, it seems, he made some entries in a book of the bills he had to present, and then took them out and presented them: and it is suggested that the whole business of a notary consists in presenting bills of exchange and drawing up protests. Even if that were so, it would be very difficult to make out that this young man, between five o'clock and bed-time, could draw up the protests upon the bills he had presented in that interval; but it is by no means correct to say that that is the whole business of a notary. A notary in the city of London has many more duties. Almost all the charter-parties are prepared by notaries, as appeared in a very late case in a trial before me at Guildhall. The ship's broker prepares the minutes of the contract, which is afterwards put into form by a notary. There is another part of the duty of a notary, which is, to receive the affidavits of mariners and masters of ships, and then to draw up their protests, which is a matter requiring care, attention and diligence. Besides that, many documents pass before notaries under their notarial seal, which gives effect to them, and renders them evidence in foreign courts, though certainly not in our courts of common law. There is a great deal, therefore, to be done by a notary, perfectly distinct and independent from this mere matter of presenting bills of exchange and drawing up protests. It seems to me, that to bring a person within the terms of this act of parliament, he should be apprenticed to a notary who can and does employ him in that which is the proper business of a notary, and not to one who is to employ him

only in going about late in the evening and presenting bills of exchange, which was the case in this instance.

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LITTLEDALE, J. (a) and PARKE, J., concurred.

Rule discharged.

(a) *Bayley*, J., was gone to chambers.

BENJAMIN WOOD and GEORGE NOTTINGE the younger, Assignees of ISAAC BRIGHTWEN, ROBERT BRIGHTWEN, and ISAAC BRIGHTWEN the younger, Bankrupts, *v.* GRIMWOOD.

TROVER by the plaintiffs, as assignees of the bankrupts, *Brightwens*, for title-deeds. The first count was upon the possession of the bankrupts, *Isaac Brightwen* and *Robert Brightwen*, before their bankruptcy: the second count was upon the possession of the assignees. Plea: not guilty, and issue thereon. At the trial before Lord *Tenterden*, C.J., at the adjourned Middlesex sittings after Hilary term, 1829, the case was this:—

A., having agreed to purchase an estate of *B.*, and having received the title-deeds, borrowed money of *C.*, and deposited the title-deeds with him as a security, agreeing to mortgage the estate to him whenever he should receive the deed of conveyance. *A.* afterwards received from *B.* the deed of conveyance of the estate, which he then delivered to *C.* as a further security. In the interval *C.* refused to complete the mortgage unless *A.* would pay usurious interest on the money lent, to which *A.* agreed. *A.* afterwards became bankrupt, and his assignees brought trover against *C.* for the deed of conveyance:—Held, that the original possession of the title-deeds being good, gave *C.* a right to the estate whenever it should be conveyed to *A.*, and therefore that *C.* was entitled to retain the deed of conveyance of the estate against the assignees of *A.*

The plaintiffs were the assignees under a commission of bankrupt, which issued on the 22nd of May, 1828, against the three *Brightwens*, under which they were duly declared bankrupts. *Isaac Brightwen* carried on, at Coggeshall in Essex, the business of a brewer, in partnership with the other two bankrupts, his brother and son, and also the business of a maltster and corn-dealer on his own separate account. The defendant was a considerable farmer in the

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same neighbourhood. In the year 1825 the bankrupts were indebted to the defendant in the sum of 5000*l.* for money lent, secured by the mortgage of an estate belonging to *Isaac Brightwen*, which he having agreed to sell to Mr. Alderman *Bridges*, he gave the defendant notice of his intention to pay off that mortgage. In May, 1825, *Isaac Brightwen* agreed to purchase of a Mr. *Tabor* of Colchester, for the sum of 16,000*l.*, an estate partly freehold and partly copyhold, comprising a brewery and several public-houses, and applied to the defendant to advance him 8000*l.*, proposing to secure 5000*l.* by a mortgage on the freehold part of the estate purchased of *Tabor*, and the remaining 3000*l.* by the bond of himself, his brother and son. On the 31st of August, 1825, Mr. Alderman *Bridges* completed the purchase of the estate he had agreed to buy of *Isaac Brightwen*. The parties met at the office of the defendant's solicitor, and the defendant was there. The 5000*l.* was paid over to the defendant by the solicitor of Alderman *Bridges*, and the defendant re-lent it to the *Brightwens*, who gave him their promissory note for it as a security until the purchase of *Tabor's* estate could be completed, and the mortgage deeds of the freehold part of that estate could be executed. In the month of September, 1825, the defendant advanced the *Brightwens* a further sum of 3000*l.* On the 19th of April, 1826, the title-deeds of *Tabor's* estate were, with his consent, delivered to the defendant's solicitor, who signed a memorandum in writing, acknowledging that the Messrs. *Brightwen* had deposited with him, as solicitor to the defendant, the several title-deeds relating to the estate therein mentioned, and which was intended to be mortgaged to the defendant, for securing the sum of 5000*l.*, immediately upon the conveyance of such estate to Messrs. *Brightwen*. On the 28th of September, 1826, the defendant having previously claimed to have the copyholds as well as the freeholds included in the mortgage deeds, *Isaac Brightwen* went to the defendant, and reminded him that by the agreement between them the free-

hold part of the estate only was to be mortgaged to him. The defendant said he had a quantity of beans and barley, which he wished the *Brightwens* to purchase. He produced a sample of each, and asked 55*s.* a quarter for the beans, and 48*s.* a quarter for the barley, which was much above the market price. *Isaac Brightwen* said, "It was 100*l.* more than they were worth, and he could not afford to lose so much money." The defendant said, "He knew it was, but that was the price he meant to have for them." *Isaac Brightwen* said, "Then you mean to have a bonus?" The defendant said, "Yes, it is worth something for the risk." *Isaac Brightwen* said, "It will be well to take care of usury." The defendant said, "He thought he could manage that, but he did not know he should have any thing to do with it;" and afterwards added, "He would let it stand over till Braintree fair, in the next week, and then *Brightwen* must give him an answer." It was agreed among the *Brightwens*, that as the loan would be for their joint use, the loss upon the transaction should be a joint concern. On the 4th of October, 1826, *Isaac Brightwen* met the defendant at Braintree fair, when the conversation about the beans and barley was renewed. The defendant said, "He would not take any less than the price he had mentioned." *Isaac Brightwen* said, "He (the defendant) knew it was more than the market price." The defendant said, "*I will have that price, or I will not complete the mortgage.*" *Isaac Brightwen* said, "If it must be so, I will take them; but I must have six months' credit, for it will take some time to turn them into money." The *Brightwens* accordingly had the beans and barley at the price named by the defendant, and they sold them at a loss of 81*l.*, though the market price was higher when they sold them than it was when they bought them of the defendant. On the 2nd of September, 1826, the brewery and public-houses were conveyed by *Tabor* to *Isaac* and *Robert Brightwen*, and on the 25th of October, 1826, the mortgage from them to the defendant was executed, and the convey-

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ance to them from *Tabor* was at the same time handed over to the defendant's solicitor, and the transactions between the parties closed.

Upon this evidence, Lord *Tenterden* left it as a question of fact to the jury, whether the bargain respecting the beans and the barley was made as the price of accepting the mortgage and continuing the loan, directing them that if they thought it was, that was a corrupt contract, which would vitiate every thing done afterwards, and the plaintiffs would be entitled to recover in respect of the deeds deposited with the defendant on the 25th of October, 1821, after the completion of the contract respecting the beans and the barley: if they thought otherwise, the defendant would be entitled to a verdict. The jury found a verdict for the plaintiffs, with nominal damages, the defendant undertaking to deliver to the plaintiffs the deeds deposited with him on the 25th of October, 1826.

In Easter term, 1829, *Tindal*, S. G., obtained a rule nisi for a new trial upon two grounds: first, that the plaintiffs, in order to entitle themselves to maintain an action for the recovery of the deeds, ought to have tendered to the defendant all the money really advanced; and for this he cited *Fitzroy* v. *Gwillim* (*a*): secondly, that by the deposit of the title-deeds of *Tabor*'s estate in April, which was prior to the making of the usurious contract, the defendant became the equitable mortgagee, and was entitled to have the legal estate conveyed to him, and the deeds, which were the evidence of the legal estate, delivered to him, upon the com-

(*a*) 1 T. R. 153, where it was held, that where goods have been pawned to secure an advance of money on an usurious contract, the owner cannot recover the goods in trover without tendering the money and legal interest,—upon the general equitable principle that he who seeks equitable relief must do equity. And see *Bosanquet* v. *Dashwood*, Cas. temp. Talbot, 38; Vin. Abr. tit. "Usury," p. 315, to the same effect. It was, however, agreed on all hands, upon the argument of the principal case, that the decision in *Fitzroy* v. *Gwillim* could not, upon any legal principle, be supported.

pletion of the purchase and the perfecting of the title; and that the deeds deposited in October were in fact deposited in pursuance of that contract, and not in pursuance of the usurious contract.

In the same term *Scarlett*, A. G., obtained a cross rule for extending the verdict for the plaintiffs to all the other deeds.

Scarlett, A.G., and *Follett*, on a former day in this term, shewed cause against the rule for a new trial. The case of *Fitzroy* v. *Gwillim*, which was cited when this rule was moved for, cannot be supported upon any principle of law. It is, indeed, a decision against all legal principle; for a person can have no title, legal or equitable, to the possession of deeds obtained under a contract founded upon an usurious consideration. The mortgage here was founded upon an usurious contract, and is therefore void; and the mortgage itself being void, the defendant can have no right to the possession of the deeds by which *Tabor* conveyed to the bankrupts, and which were delivered to the defendant on the very day the mortgage was executed. [*Brougham*, who was to support the rule, here admitted that he could not rely upon the decision in *Fitzroy* v. *Gwillim*, and must therefore abandon the first ground upon which the rule was obtained.] Then, as to the second ground. Assuming that the deposit of *Tabor's* title-deeds in April gave the defendant an equitable title, from that time, to the deeds of conveyance from *Tabor* to the bankrupts, still the subsequent corrupt contract rendered him a party *in delicto*, and prevented him from setting up that title as an answer to the claim of the assignees. That the mortgage was ultimately accepted in pursuance of the corrupt contract is clear, for the defendant refused to go on with the original bargain: he is told that the price he asks for the barley and beans is more than the market price, which he does not deny, but says in answer, "I will have that price, or I will not complete the mortgage." [*Parke*, J. The only question in the case is this—Had he, or had he

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not, an equitable title to the deeds of conveyance from *Tabor* to the bankrupts before the mortgage was executed? If he had not—if his title first accrued at the time of the execution of the mortgage,—it is quite clear that it cannot be supported, because of the usurious contract; but it seems to me that he had an equitable title to those deeds prior to that usurious contract: and if he had, such a title is certainly a good answer to an action brought by the assignees of a bankrupt. Suppose those deeds had been handed over to the defendant at the time when this usurious contract was made,—he would then have had a legal title to them;—would he lose that title by any subsequent usurious transaction, as by refusing to continue the loan without a bonus? If he would not, neither does he lose his equitable title in this case; and if he does not, he is not answerable to the assignees. He did not acquire his equitable title by the corrupt bargain: he had it before. If, when he threatened not to complete the mortgage unless he had a particular price for the corn, he meant to abandon his right to have a mortgage at all, and no longer to enforce the contract for that mortgage made in April,—in that case he has lost his equitable right by his own act. If, on the other hand, which seems to me the real effect of the transaction, he meant, not to abandon his existing right, but merely to say that he would not allow the money to remain any longer on loan,—in that case he has not lost his equitable right; and that right is an answer to this action.] The deeds deposited in April were not intended as a security for the 5000*l.* advanced, but were deposited for the specific purpose of completing the mortgage security; and having been deposited for that purpose, and the person with whom they were so deposited having refused to complete the mortgage, he could no longer have any equitable right arising out of the deposit, because he had refused to perform the specific purpose for which the deposit was made.

Brougham, *F. Pollock*, and *Wightman*, contrà. The

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plaintiffs cannot recover the deeds deposited with the defendant subsequently to the alleged usurious transaction, because the execution of the mortgage by the party depositing those deeds was not voluntary. The deeds deposited with the defendant in April, prior to the alleged usurious transaction, as a security for the advance of the 5000*l.*, gave him an equitable right from that moment; in fact, he then became the equitable mortgagee; *Russell* v. *Russell* (*a*): if so, he had then a right to have the legal estate conveyed to him as soon as that was feasible, for the deposit of title-deeds upon a loan of money, or for any legal consideration, gives the pledgee a right to have the legal estate conveyed to him: *Ex parte Wetherell* (*b*). Upon a contract for the sale of an estate, the title and abstract to be made at the vendor's expense, the purchaser is entitled to the custody of the abstract until either the purchase is finally rescinded by consent, or is declared impracticable by a court of equity: *Roberts* v. *Wyatt* (*c*). In this case the defendant had nothing to complete: he had performed his part of the contract by the advance of the 5000*l.* But the borrower of that money had something to complete; he had partially secured the lender by depositing with him *Tabor*'s title-deeds, and thereby giving him an equitable right to the estate which was to be mortgaged as the security for the loan; but it still remained for him to secure him entirely, by giving him *Tabor*'s deeds of conveyance, and thereby clothing him with the legal right to that estate. The contract made in April gave the defendant a right to the conveyance made in October, and he did not lose that right by agreeing in the interval to give an illegal consideration for the conveyance, because his right existed before the agreement for that illegal consideration was made. In *Barnes* v. *Hedley* (*d*) it was held, that after usurious securities given for a loan had been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest

(*a*) 2 Bro. Ch. Ca. 290.
(*b*) 11 Vesey, 401.
(*c*) 2 Taunt. 268.
(*d*) 2 Taunt. 184.

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was founded on a sufficient consideration and binding. As to the other deeds, which were deposited with the defendant before the alleged usurious transaction, the plaintiffs cannot, at all events, recover those; for they were deposited in pursuance of the original contract made in April, which was a perfectly valid contract, upon which the subsequent corrupt contract could not have a retrospective effect.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord TENTERDEN, C. J.—We are of opinion that the rule for a new trial in this case ought to be made absolute. The defendant had, in April, 1826, obtained the possession of the title-deeds of an estate about to be purchased of Mr. *Tabor* by two of the *Brightwens*, upon a good and valid consideration, unmixed and untainted with any usury whatever; and the question is, whether or not he is entitled to retain the deeds of conveyance of that estate from Mr. *Tabor* to the *Brightwens*, which were deposited with him in October in the same year. The objection taken to his right to do so was, that in the interval between the deposit of the title-deeds in April and of the deeds of conveyance in October, there had been conversations between one of the *Brightwens* and the defendant, in which the defendant had insisted upon having a bonus, "otherwise"—according to his own phrase—"he would not *complete*;" and it was contended, on the part of the plaintiffs, that the deeds of conveyance having been delivered after that conversation, that conversation being evidence of an usurious contract, the defendant could not retain those deeds. We are, however, of opinion that the original possession of the title-deeds being perfectly good, and free from any vice or any kind of usury, gave him a right to the estate whenever Mr. *Tabor* should convey that estate to the *Brightwens*; and that he, having a right to the estate itself whenever it should be conveyed, had a right also to the deeds of conveyance of that

estate. The verdict taken was confined to those deeds; and we think the defendant is entitled to those deeds, and, consequently, that the rule for a new trial ought to be made absolute. The rule obtained on behalf of the plaintiffs, that the verdict should stand as a security for the delivery up of the other deeds, must, of course, be discharged.

Rule for a new trial, absolute.
Rule to extend the verdict, discharged.

The King *v.* The Inhabitants of Great Bentley.

Under 6 *Geo.* 4, c. 57, and before 1 *Will.* 4, c. 18, a settlement was gained by renting a dwelling-house and land at a rent exceeding 10*l.* actually paid, provided the whole tenement were occupied under the renting, although the land were not occupied by the renter himself, but by a sub-lessee of the land.

UPON appeal an order of removal from Little Clacton to Great Bentley, in Essex, was confirmed, subject to the following case:—

The pauper (*John Pelling*) hired a tenement, consisting of a separate and distinct dwelling-house and a field of two acres, in Little Clacton, from 25th December, 1826, for two years, at 13*l.* 10*s.* a year. In March, 1827, the pauper sold the grass in the field from that time till Michaelmas, for 10 guineas, to *John Townsend*, to be mowed or fed, during which time the pauper discontinued turning a cow and an ass into the field, as he had before done, because he did not consider that he could feed the grass after the sale to *Townsend*. The pauper asked and obtained *Townsend*'s leave to stack some clover in the field, and abated one shilling from a claim which he had against *Townsend* for labour, as an acknowledgment for damage done to the grass by the clover stack. The pauper sold the grass to *Townsend* in the same way in 1828. The court of quarter sessions held, that no settlement was gained, inasmuch as during the pauper's agreements with *Townsend*, he did not occupy the field under his yearly hiring in the manner required by 6 *Geo.* 4, c. 57.

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Knox and *Brodrick*, in support of the order of sessions. The occupation of the house and the occupation of the land were distinct, and if ejectment had been brought to recover both, there must have been a separate service of a declaration in respect of each, upon the pauper and upon *Townsend*. So each would have been separately liable to assessment to the poor-rate. This distinguishes the present case from *Rex* v. *Ditcheat* (*a*), where the tenement consisted of a house only. Besides which that case is of doubtful authority. The decision was not unanimous, and one of the learned judges, who concurred in the judgment, thought that the intention of the legislature would be thereby defeated. By this statute it was intended to place houses on the same footing as land, and not to place land in the situation of houses under 59 *G.* 3, c. 50. *Rex* v. *North Collingham* (*b*), *Rex* v. *Toubridge* (*c*). The 59 *Geo.* 3, c. 50, expressly requires the occupation for a year to be by the person hiring. The latter words are not found in 6 *Geo.* 4, c. 57, which requires the occupation to be for a year under such yearly hiring; but the omission of these words ought not to be allowed to defeat the clear intention of the legislature. The words even of the latter statute are, however, not satisfied. No person but the lessee and his assigns can be said to occupy *under the original yearly hiring*, the occupation of a sub-lessee being referable to the sub-letting. A sub-lessee, therefore, does not occupy under the original yearly hiring, and here the original lessee does not occupy at all. The agreement with *Townsend* amounted to a sub-lease, *Rex* v. *Stoke* (*d*).

Mirehouse contrà. The 6 *Geo.* 4, c. 57, requires an occupation under the yearly hiring; here the tenement was occupied by the pauper or his sub-lessee. The pauper was

(*a*) *Ante*, vol. iv. 151; 9 Barn. & Cressw. 176.

(*b*) 2 Dowl. & Ryl. 745; 1 Barn. & Cressw. 578.

(*c*) 9 Dowl. & Ryl. 128; 6 Barn. & Cressw. 88.

(*d*) 2 T. R. 451.

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the legal tenant, he was rated and was liable to a distress, and to an action for use and occupation. By omitting the words "by the person hiring the same;" the late statute dispenses with an actual occupation by the lessee, and occupation under the yearly hiring will be satisfied by the occupation of a sub-lessee. The Court will not do violence to the words of the statute in order to give effect to a suggestion as to the intention of the legislature. *Rex* v. *Barham* (*a*). But the agreement between the pauper and *Townsend* was not a sub-lease, it was merely a sale of the grass (*b*).

Cur. adv. vult.

Lord TENTERDEN, C. J.—We are of opinion that every thing required to be done by 6 *Geo.* 4, c. 57, s. 2, was done in this case, and that the pauper gained the settlement in question. That statute enacts, that no person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of settling upon, renting, or paying parochial rates for, any tenement not being his or her own property,—unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bonâ fide rented by such person, in such parish or township, at and for the sum of 10*l.* a year at the least, for the term of one whole year,—nor unless such house or building, or land, shall be occupied under such yearly hiring, and the rent for the same, to the amount of 10*l.*, actually

(*a*) 8 Barn. & Cressw. 99.

(*b*) That an interest in the soil passes upon the sale of growing grass, see *Crosby* v. *Wadsworth*, 6 East, 602, and 2 Smith, 559; *Shelton* v. *Livins*, 2 Crompt. & Jerv. 411, 2 Tyrwh. 420. As to other growing crops, see *Parker* v. *Staniland*, 11 East, 362; *Poulter* v. *Killingbeck*, 1 Bos. & Pull. 397; *Emmerson* v. *Heelis*, 2 Taunt. 38; *Warwick* v. *Bruce*, 2 Maule & Selw. 205; *Waddington* v. *Bristow*, 2 Bos. & Pull. 452; *Mayfield* v. *Wadsley*, 5 Dowl. & Ryl. 224, 3 Barn. & Cressw. 357; *Evans* v. *Roberts*, 8 Dowl. & Ryl. 611, 5 Barn. & Cressw. 829; *Smith* v. *Surman*, *ante*, vol. iv. 455, 9 Barn. & Cressw. 561; *Scorell* v. *Boxall*, 1 Younge & Jerv. 396; *Earl of Falmouth* v. *Thomas*, 1 Crompt. & Mees. 89, 3 Tyrwh. 26.

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paid for the term of one whole year at the least. Here the only question was, whether there was an occupation of the whole of the tenement under the yearly hiring? It was objected that the pauper did not occupy the whole under the yearly hiring; that he let off the land; and that this clause of the act of parliament, therefore, was not satisfied. There is a difference between the language of the statute 6 *Geo.* 4, c. 57, s. 2, and that of the 59 *Geo.* 3, c. 50. The last-mentioned statute required that the house should be held, and the land occupied, *by the person hiring the same*; but the latter words are omitted in the 6 *Geo.* 4, c. 57. The legislature, when they passed that statute, must be presumed to have had in their minds the very act (59 *Geo.* 3, c. 50,) which they were repealing. We cannot, therefore, but consider that those words were left out by design. Then the only question is, whether the whole was occupied under the yearly hiring? It is clear that it was. That being so, every condition of the act of parliament has been complied with, and the pauper has gained a settlement.

We think it much safer to adhere to the words of the statute according to their ordinary import, than to enter into any inquiry as to what may have been the intention of the persons who framed it. The order of sessions must therefore be quashed.

Order of Sessions quashed (*a*).

(*a*) But now, by 1 *Will.* 4, c. 18, no person shall acquire a settlement by reason of such yearly hiring of a dwelling-house or building, or of land, or of both, unless such house or building, or land, shall be actually occupied under such yearly hiring *by the person hiring the same*, for the term of one whole year at the least, and unless the rent for the same, to the amount of 10*l.* at the least, shall be paid by the person hiring the same. And see *Rex* v. *St. Nicholas, Rochester*, 3 Nev. & Mann. 21, 5 Barn. & Adol. 219; *Rex* v. *Banbury*, 3 Nev. & Mann. 292, 1 Adol. & Ellis, 136; *Rex* v. *Wootton*, 3 Nev. & Mann. 312, 1 Adol. & Ellis, 232; *Rex* v. *St. John, Hackney*, 4 Nev. & Mann. 336; *Rex* v. *St. Nicholas, Colchester*, ib. 422, 2 Adol. & Ellis, 599; *Rex* v. *Willoughby*, 5 Nev. & Mann. 457; *Rex* v. *St. Giles in the Fields*, 6 Nev. & Mann. 5.

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DOE, dem. JOHN ALFRED WIGAN *v.* THOMAS JONES.

EJECTMENT for lands at Mayfield. At the Sussex Summer assizes, 1828, *Garrow*, B. nonsuited the plaintiff, giving him liberty to move to enter a verdict. Upon the motion the Court directed a special case, with leave to either party to turn it into a special verdict.

Conveyance to such uses as *A.* shall appoint; in default, to *A.* for life, remainder to a dower trustee for *A.*'s life, remainder to *A.* in fee. *B.* recovers judgment against *A.*, who afterwards appoints the immediate fee to *C.* This appointment over-reaches the judgment, and entitles *C.* to enter upon *B.*'s possession obtained under an elegit issued subsequently to the appointment.

Michaelmas term, 1822, a judgment was entered up at the suit of the defendant *Jones* against *Thomas Baker*, clerk, for 6000*l.*, on which *Jones* issued an elegit into Sussex on 15th December, 1827. Under an inquisition finding *Baker* seised, the sheriff delivered the premises to *Jones* as his freehold (*a*), according to the statute (*b*), until he should thereof have fully levied the debt and damages.

The title and seisin of *Baker* commenced by indenture bearing date 29th and 30th November, 1826, whereby the premises were conveyed to such uses, and for such estates and interests, intents and purposes, and upon such trusts, and charged and chargeable in such manner, and subject to such powers, provisoes, conditions, limitations, declarations and agreements, as *Baker*, at any time or times, and from time to time thereafter, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be sealed and delivered by *Baker*, in the presence of, and to be attested by two or more credible witnesses, should direct, limit or appoint, and in default of, or until such direction, limitation or appointment, or in case any such should be made, then subject thereto, and when and as the estate or estates, interest or interests thereby directed, limited, appointed or created, should respectively end and determine, and in the mean time subject thereto, and as to such part or parts of the same several hereditaments and premises, and all such

(*a*) The tenant by elegit, notwithstanding these words, following the statute, has only a chattel interest. *Vide* 2 Inst. 396; Mann. Exch. Pract. 2d ed. 39, 43, 46, n.

(*b*) 13 *Edw.* 1, (Westm. 2) c. 18.

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estate and interest therein, of which no such direction limitation, or appointment should be effectually made as aforesaid, to the use of *Baker* and his assigns, for and during the term of his natural life, without impeachment of waste; and from and after the determination of that estate by any means in his lifetime, to the use of *Beriah Drew* and his executors and administrators, during the life of *Baker*, in trust, nevertheless, for *Baker* and his assigns, and to permit and suffer him and them to receive and take the rents and profits thereof to his and their own use and benefit, and also to prevent any wife of *Baker* from being entitled to dower out of or in the premises, or any part thereof; and from and after the determination of the estate so limited in use to *Beriah Drew*, and his executors and administrators, during the life of *Baker*, in trust as aforesaid, and in the mean time subject thereto, to the only proper use and behoof of *Baker*, his heirs and assigns for ever.

By indenture, dated 29th March, 1827, and made between *Baker*, of the one part, and *Wigan*, the lessor of the plaintiff, of the other part, and duly executed and attested according to the said power, after reciting the said indentures of lease and release, and stating in that recital the said power, and also reciting a loan of 4000*l.* from *Wigan* to *Baker*, and after reciting that *Wigan*, being satisfied that the hereditaments thereinafter described were a sufficient security for the repayment of the said sum of 4000*l.* and interest, had agreed to accept a mortgage of the same, and to release other hereditaments situate at West Malling and East Malling from the charge or lien created by the therein recited bond; and by such deposit of the title-deeds relating thereto, as in the said bond mentioned, it was witnessed, that in pursuance of the therein recited agreement, and in performance of the condition of the bond, and in consideration of 4000*l.* so due to *Wigan* from *Baker* as aforesaid, and for a nominal consideration, he, *Baker*, pursuant to and in execution of the said power or authority, and of all other powers or authorities, did direct, limit, and appoint, that the

messuages, lands, and hereditaments thereinafter described, with their appurtenances, should thenceforth remain, continue and be,—and that the thereinbefore recited indenture of the 30th November, 1826, should thenceforth operate and enure,—to the use of *Wigan*, his executors, administrators and assigns, for the term of 500 years, to commence and be computed from the day of the date of the then reciting deed, and fully to be complete and ended, without impeachment of waste, subject, nevertheless, to the proviso for cesser thereinafter contained. And it was thereby further witnessed, that in further pursuance of the said agreement, and for the consideration aforesaid, *Baker* did grant, bargain, sell, and demise unto *Wigan*, divers hereditaments, situate at Mayfield, and including all the lands in question, to hold the same unto *Wigan*, his executors, administrators, and assigns, for the said term of 500 years, to commence and be computed as thereinbefore mentioned, without impeachment of waste, with a proviso for cesser of the said term, if *Baker*, his heirs, executors, administrators or assigns, or some of them, should pay to *Wigan*, his executors, administrators or assigns, the sum of 4000*l.* on the 11th day of October, 1829, with interest, at the rate of 5*l.* per cent. per annum, to be paid half-yearly, on the 6th day of April and 11th day of October, in the meantime, without deduction or abatement. And it was agreed that until default should be made in payment of the said sum of 4000*l.*, and interest, or some part thereof, contrary to the true intent of the deed, it should be lawful for *Baker*, his heirs and assigns, peaceably and quietly to hold and enjoy the premises, and to receive the rents thereof for his and their own use, without any hindrance, suit, eviction, claim or demand whatsoever by *Wigan*, his heirs or assigns, or any other person or persons claiming by, from or under him, them, or any of them. The said *Baker* made default in payment of the interest before the 12th April, 1828, on which day the demise to the nominal plaintiff is laid.

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Preston (with whom were *Broderick* and *Manning*) for the plaintiff.

The question in this case is, whether priority belongs to the mortgagee, or to the judgment creditor. It may be admitted that the judgment attached upon the life estate and upon the ultimate fee. But consistently with principle and with the rule of law and rule of property, the debtor, by executing the appointment, defeated his own life estate and ultimate fee. It may be admitted, that if he had made a demise without mentioning the power, the judgment would have had priority over the demise. The appointee is enabled to claim without noticing the ulterior uses. So, in pleading (*a*), [*Bayley*, J. Being in, as you say, paramount.] The judgment creditor does not come in under the conveyance. There is no law to prevent a debtor from defeating his creditor by executing an appointment, provided the act done be not contrary to good faith. In Sir *Edward Clere's* case (*b*) an attempt was made to avoid the restriction in the statute of wills, as to devises of land held by knight's service. The only question there was, whether the devise took effect by virtue of the power, or by virtue of the

(*a*) If two joint tenants be seised of an estate in fee simple, and the one grant a rent-charge by his deed to another, out of that which to him belongs; in this case, during the life of the grantor, the rent-charge is effectual; but after his decease the grant of the rent-charge is void as to charging the land, for he who has the land by survivor, shall hold all the land discharged, and the course is, that he who survives has the land by surviving, and has not, nor can he claim any thing thereof by descent from his companion, &c., Litt. 286; upon which Lord *Coke* says, "Here again *Littleton* sheweth the reason; and the cause wherefore the survivor shall not hold the land charged is, for that he claimeth the land from the first feoffor, and not by his companion, which is *Littleton's* meaning when he saith "that he claimeth by survivor," *for the surviving feoffee may plead a feoffment to himself, without mentioning his joint feoffee;* and this is the reason, that if two joint tenants be in fee, and the one maketh a lease for years, reserving a rent, and dieth, the surviving feoffee shall have the reversion by survivor, but he shall not have the rent, because he claimeth from the first feoffor, which is, *paramount the rent.* Co. Litt. 185, a; 1 Tho. Co. Litt. 750.

(*b*) 6 Co. Rep. 18, a.

ownership. It was admitted, that if the devise operated by virtue of the power, it would defeat the prohibition of the statute. In *Ray* v. *Pung* (*a*) the question was, whether the wife was dowable of a fee of which the husband had seisin? It was admitted, that there was a time when she was dowable; but the power of appointment was exercised, and the Court decided that the fee was defeated, so that the title of dower which had attached was defeated. If dower can be defeated, why not a judgment creditor? at least as far as the appointment goes. That case runs upon all fours with the present; or if there be any difference, it is, that dower is more favoured. In *Roach* v. *Wadham* (*b*), the question was, whether a covenant was so knit to the estate that an appointee could not take advantage of it. It was held, that the appointee was in, not by the donee of the power, but by the donor, and by title independent of the covenant. All these cases are directly in point. So, in *Maundrell* v. *Maundrell* (*c*). In *Witham* v. *Bland* (*d*) it was held, that a sequestration was overreached by the execution of a power. There is no difference between the effect of a sequestration and of an elegit. No doubt was entertained in that case as to the operation of a limitation taking effect under the power, supposing it to be duly executed. If the estate had continued in the same state, the sequestration would have been available. The only question was, whether a donee of a power to revoke uses had an implied power to create new uses.

Richmond, contrà. This mode of defeating judgment creditors is a perfect novelty, and cannot be supported. It is usual in practice, for conveyancers to direct searches to be made for judgments. It has never been considered that protection from judgments could be obtained by this

(*a*) 5 Barn. & Ald. 561; 5 Madd. 310.
(*b*) 6 East, 289; 2 Smith, 376.
(*c*) 10 Ves. 246.
(*d*) Finch, 126; since also reported from Lord Nottingham's MSS. 3 Swanst. 277 n.

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short course. Lord *Eldon* has repeatedly said, that the practice of conveyancers is evidence of the state of the law (*a*). The absence of express authority on this point is

(*a*) Perhaps the most remarkable instance of judicial deference shewn to the practice of conveyancers is afforded by the doctrine, that dower may be excluded by the assignment of a prior legal term to a trustee for a purchaser, with full notice; and that, although the term may have been previously assigned to attend the inheritance generally, yet there must be a fresh assignment in the particular transaction; a doctrine which appeared to Lord *Eldon* so contrary to principle as to produce from that learned judge the strong declaration, that if the point were *res integra*, the proposition, that the purchaser should get in the term, and with full notice, not squeeze out any *other incumbrancer*, but exclude the dower, would be *monstrous*. His lordship was at first inclined to treat the assignment to a new trustee as "an idle ceremony," but he afterwards admitted the distinction between the effect of a term assigned, and not assigned, in excluding the dowress, to be established, though "it had prevailed upon no principle, but *merely upon the practice of conveyancers*," and stated that the Court was bound, "not by a principle, upon which it can well reason, but by a practice of conveyancers, found to be inveterate, to confine the protection against dower to the case of an actual assignment." *Maundrell* v. *Maundrell*, 10 Ves. 262, 271, 272: and see Lord *Hardwicke*'s observations in *Swannock* v. *Lifford*. Butl. Co. Litt. 208 a, n. (105.) From Lord *Hardwicke*'s judgment in that case it appears, that in Lord *Radnor* v. *Vandebendy*, where Lord *Somers* had reversed a decree of Lord *Jefferies*, setting aside the assignment of a term, assigned to a trustee for the purchaser for the purpose of defeating a claim to dower, of which the purchaser had notice, "there was a great inclination in the House of Lords to reverse that decree of Lord *Somers*; but when the counsel came to the bar, the Lords asked *whether it was usual for conveyancers* to convey terms for years to attend the inheritance to prevent dower; and the counsel, with great candour, saying that it was, the Lords affirmed Lord *Somers*'s decree."

On other occasions conveyancers have been less favourably treated. Their doctrine and practice as to inalienable trusts for married women, was not, as in the former case, an inveterate abuse, but reserved, as Lord *Eldon*, in 1805, says, (*Parkes* v. *White*, 11 Ves. 221,) *upon true principle*, and originated in the suggestion and practice of Lord *Thurlow*, C., conveyancers merely adopting what the Court had sanctioned. In 1817, Lord *Eldon*, addressing himself to the clause against anticipation, said (in *Jackson* v. *Hobhouse*, 2 Mer. 1487,) "Lord *Alvanley*, who followed, thought it a valid clause, and so it has been considered ever since. It is *now too late* to contend against the

in the defendant's favour. By the statute of Westm. 2, cap. 18, judgments bind the land, and in 30 *Ed.* 3, 24, a (*a*),

validity of a clause in restraint of anticipation." Nearly twenty years, however, after the decision in *Jackson* v. *Hobhouse*, the whole system, which, after being established by Lord *Thurlow*, has formed so important a branch of modern conveyancing, appeared to be menaced with destruction. See *Newton* v. *Reid*, 4 Simons, 141; *Brown* v. *Pocock*, 5 Sim. 663; *Massey* v. *Parker*, 2 Mylne & Keen, 174. But see *Anderson* v. *Anderson*, ibid. 427; *Davies* v. *Thornycroft*, 6 Sim. 420; *Johnson* v. *Freeth*, ib. 423, n.; *Stoffe* v. *Everett*, 1 Mylne & Craig, 37.

The doctrine upon this point, as long received and acted upon by conveyancers, is stated to be, that a gift to the separate use of a female, expressly without power of anticipation, was effectual, as well to confer the sole enjoyment as to restrain alienation, whenever the restricted gift and the state of coverture coexisted; but that, as without coverture there cannot be separate estate, and as the right of disposition incident to property cannot, even with reference to a life interest, be denied, except in the instance of separate estate, it was competent to the object of the gift, *whilst discovert*, to dispose of her interest absolutely.—*Vide Hayes, Separate Estate*, 39.

(*a*) M. 30 *E.* 3, fo. 24. "A man had recovered a certain debt against Sir *John de Moleyns*, and had an elegit; the sheriff returns that *John* has nothing.

"*Momb.* [*John de Mowbray*, King's Serjt.] prayed a capias.

"*Fish.* [*Fishide.*] Since you had execution at your election, and you elected an elegit, you cannot now have another execution.

"*Momb.* After fieri facias, if the sheriff returns that he has nothing, a man shall have an elegit.

"*Seton*, [King's Serjt.]. Every elegit includes a fieri facias.

"*Finch* [*Finchden*]. If at the time of judgment rendered he had some land, but has since aliened it, you may have execution of that, and if he purchases land afterwards, you shall have execution of that, for you shall have elegit sicut alias et sicut pluries. And if you have no land at the time of judgment rendered, it was your own folly that you would pray an elegit, when you were informed that he had nothing; wherefore there is no mischief although you have not the capias," &c.

In abridging this case, *Fitzherbert* adds,—"and *Thorpe*, (C. J. of C. P.) says, that the cause is, because the entry is, that such a one comes et elegit executionem suam de medietate, &c., which is the highest execution, &c." It was afterwards, however, held, that if an elegit be returned nihil within the year, the party may, within the year, have execution by ca. sa. or fi. fa. *Andrews* v. *Cope*, 1 Roll. Abr. 904, 905. And upon further consideration of statute Westm. 2, c. 18, it was adjudged, that neither the entry of a prayer of the elegit, or even an award of the writ upon the roll, should, without the sheriff's return of the delivery of land according to the exigency of the writ, be any bar to an execu-

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it was held, that where a debtor against whom judgment is recovered, aliens his lands, such lands are liable to execution, as are also lands acquired after the judgment. The second statute for the rejection of uses (*a*) made them subject to judgment creditors. The judgment binds the use, and the elegit is in the nature of a *grant*. [*Bayley*, J. Suppose that *Baker*, without referring to the power, had granted an estate for life, would that have prevented the execution of the power?] A lease granted by tenant for life cannot be defeated by the subsequent execution of a power vested in him. *Snape* v. *Turton* (*b*), *Yelland* v. *Ficlis* (*c*), *Bullock* v. *Thorne* (*d*), *Goodright* v. *Cater* (*e*). Powers are but a modification of uses, and uses were expressly made subject to an elegit by 19 *Henry* 7, cap. 15, which remedy is extended by the Statute of Frauds (*f*). It is said that these statutes do not affect powers of appointment. The abstract idea of a power had no existence at common law. It would have been thought strange that a person

tion by fi. fa. or ca. sa. *Knowles* v. *Palmer*, Cro. El. 160; *Cowper* v. *Langworth*, ib. 608, and Sir F. Moore, 545; *Foster* v. *Jackson*, Hob. 57, 58; *Pilmer* v. *Knowllis*, 1 Leon. 176; *Glascock* v. *Morgan*, 1 Lev. 92; *Lancaster* v. *Fielder*, 2 Lord Raym. 1451.

(*a*) 19 *H.* 7, c. 15, which, after reciting that divers and many persons be defrauded of their execution, as well of and upon recognizance, statutes of the staple, statutes merchant, to them made, as of their debts and damages recovered in action of debt, trespasses, or other actions, enacts, "that it shall be lawful for every sheriff or other officer to whom any writ or precept is or shall be directed, at the suit of any person or persons, to have any execution of any lands, tenements, or other hereditaments, against any person or persons, of, for, and upon any condemnation estatute-merchant, estatute of the staple, recognizance hereafter to be made or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands and tenements, as any other person or persons be in any manner of wise seised, or hereafter shall be seised in any wise, to the only use of him against whom execution is so sued, like as the said sheriff or other officer might or ought to have done, if the said party against whom execution hereafter shall be so sued, had been solely seised of to his use at the time of the said execution sued."

(*b*) W. Jones, 392.

(*c*) F. Moore, 788.

(*d*) Ibid. 618.

(*e*) 2 Dougl. 477.

(*f*) 29 Car. 2, c. 3, s. 10.

should have an estate, and a power of conveying a *different* estate from that which he had. Sir *Edward Clere's* case shews that a statute may be defeated, but even then it was only held that the acts of the appointor superseded the power pro tanto. The doubt was, whether such acts did not suspend the power altogether. It was held that it was not in the nature of a condition, and therefore entire. In *Long* v. *Rankin* (*a*), *Abbott*, C. J., in delivering the opinion of the judges in the House of Lords, says—"It is true that *Robert Crawford* could not, after having conveyed his life-estate, derogate from the effect of that conveyance by an execution of his power; and the inability to derogate from a prior conveyance, works what is usually called a *suspension* of a power. As if land be granted to *A.* and his heirs, to such uses as *B.* shall appoint, and in the meantime to *B.* for his life or any greater estate, here *B.* has a power to limit and appoint the uses of the fee; but if he makes a lease for years or for life, before he executes that power, *common justice requires that he should not derogate from his own grant by a subsequent appointment of the fee;* and his power, therefore, is suspended as far as regards the lease and the interest of the lessee, and his appointee must take subject to the lease. Lord Chief Baron *Gilbert* says (*b*), 'If tenant for life, with power to make leases or revoke, grants a rent-charge, and then makes a lease according to his power, the lessee shall hold it charged during the life of the tenant for life, *for he hath power to charge his own interest*, which, by his own act, cannot be avoided. And if in this case he covenant to stand seised to the use of a stranger, he cannot, by any after-act, revoke the uses; for since the execution of this power falls within the compass of the estate, (so that, unless it be executed during the continuance of the estate, it can never be executed;) therefore, whatever act passes away the estate, hinders the execution of this power of demising; *for a man cannot demise that estate which he hath passed away to another.*'" Here, the

(*a*) Sugd. Pow. App. No. 3. (*b*) Gilb. Uses, 142.

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power is *appendant*, and not simply collateral; *Sacheverell* v. *Dale* (*a*). That was the case of a lease; but what substantial difference is there between an interest created by lease and an interest created by elegit (*b*)? In either case the power must be suspended pro tanto; and if the power can be suspended by the act of the party, à fortiori may it be suspended by the act of the law. It may be said that a judgment is a proceeding *in invitum* (*c*). But it is not always so; a judgment may be entered up on a cognovit, or on a warrant of attorney, and it does not appear upon this special case whether the judgment was obtained by consent or in an adverse suit (*d*).

(*a*) Latch, 268.

(*b*) *Ante* 563, (*a*); 566; *post*, 576.

(*c*) *Vide post*, 582.

(*d*) The judgment was in truth upon a warrant of attorney, but this fact not being stated in the admissions upon which the trial took place, was not introduced into the special case. But though an execution of a power of appointment for the purpose of defeating an elegit upon a judgment by consent, is in derogation of the party's own act, it has been since held, that the appointment shall have priority over the execution, whether the judgment be in invitum or by consent, and whether the appointee has or has not notice of the judgment. *Eaton* v. *Sanxter*, 6 Sim. 517. Yet, in equity, a judgment is considered a present lien upon a trust estate, such trust estate being rendered liable to execution by the Statute of Frauds, (25 *Car.* 2. c. 3,) s. 10. But a mere equity of redemption, unaccompanied by any legal reversion, or any express trust for sale, is not subject to execution (*Lyster* v. *Dolland*, 3 Bro. C. C. 478,) but the judgment creates a lien in equity, (*post*, 580,) because by means of an elegit, the lands may be equitably put in charge. And therefore, like any other specific charge upon the property, it may be *tacked* to a prior mortgage, (Fonbl. Treat. Equity, 5th ed. 270; Coote, Mortgages, 393, 422, 423; Sugd. V. & P. 9th ed. 542.) Where however the land is not liable to process by elegit, as in the case of a copyhold, the judgment cannot be tacked to the mortgage. (*Cannon* v. *Park*, 6 Vin. Abr. 229, *tit.* Copyhold, (O. e), pl. 6; and see *Morris* v. *Jones*, 3 Dowl. & Ryl. 603.) But an equity of redemption may be taken by the Crown, under an extent. *Rex* v. *Coombes*, 1 Price, 207; *Rex* v. *Delamotte*, Forrest, 162. In *Smith* v. *Wheeler*, 1 Vent. 128, it was found by a special verdict in ejectment, that in 1648 *Simon Maine*, being possessed of a rectory for a term of eighty years, assigned it to *A.* and *B.*, in trust for himself for life, and after his death for payment of debts, &c., and for his issue, with a proviso, that if *Simon Maine* should be minded to make void the indenture, or frustrate any use or trust therein, or

By 21 *Jac.* 1, c. 19, s. 12, commissioners of bankrupts are authorized to convey "any manors, lands, tenements, or hereditaments, whereof any bankrupt should, is, or shall be in any manner seised."

By 13 *Eliz.* c. 7 (*a*), commissioners of bankrupts are authorized "to take by their discretion such order and direction, with all his or her lands, tenements, hereditaments, as well copyhold or customaryhold as freehold, which he or she shall have in his or her own right before he or she became bankrupt, and also with all such lands, tenements, and hereditaments, as shall have been purchased or obtained for money or other recompence, jointly with his wife, children, or child, to the only use of such offender or offenders, or of or for such use, interest, right, or title, as such offender or offenders shall then have in the same, which he or she may lawfully depart withal, or with any person or persons of trust to any such use of such offender or offenders." Under this enactment it has been held, that the bargain and sale inrolled, though in invitum, destroys the power; *Doe* d. *Coleman* v. *Britain* (*b*). That is a case

create any new, or to dispose the estate in any other way, and such his purpose should declare by writing, &c., then the trusts therein, or so many of them, &c., should be void, &c.; that in 1644 he had issue, a son; that he took the rents and profits during his life, and made leases; that *Simon Maine* committed treason in 1648, of which he was afterwards attainted; that he died in 1661; that *A.* and *B.* had no notice of the assignment till after the death of *Simon Maine*, when *A.* assented and *B.* dissented to the assignment; that by 12 Car. 2, c. 30, all manors, lands, &c., leases, &c., which *Simon Maine*, or any to his use, or in trust for him, had, 25th March, 1646, or at any time since, were forfeited; that the king made a grant to the plaintiff *Smith*. It was held in Common Pleas and King's Bench, upon error, that the term was not forfeited, notwithstanding the power of revocation. *Simon Maine*, the cestui que trust of the term for life, not having *jus* disponendi, though in a qualified manner, and to be executed with certain circumstances, he had *potestatem* disponendi. And see Sir *Christopher Hatton*'s case, *post*, 578, 581.

(*a*) Sect. 2. And see 6 *Geo.* 4, c. 16, s. 12; *Doe* d. *Shaw* v. *Steward*, 3 Nev. & Mann. 372; 1 Adol. & Ell. 300.

(*b*) 2 Barn. & Alders. 93. And see *Thorpe* v. *Goodall*, 17 Ves. 388, 1 Rose, 40, 270; *Badham* v. *Mee*, 7 Bingh. 695, 1 Moore & Scott, 14; *Anon.* Lofft, 71.

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expressly in point. In *Bro. Abr.* tit. Feoffements al uses, pl. 25 (*a*), it is said cestui que use is bound in a statute

(*a*) Citing 7 *H.* 76. "One *T. L.* brought a writ of trespass against *W. de S.*, and said, that *J. S.* made a feoffment of the same land to the said *W.* sur confidence, and afterwards he made the recognizance in statute merchant to the plaintiff, who by force thereof sued execution against *J. S.* And all the matter was pleaded in certain, and the trespass is supposed to be done in the time of the now King (*H.* 7), and execution was in the time of King *Edward* 4; and the defendant said, that in the time of *Edward* 4, after the said execution, he entered upon the plaintiff and ousted him, and afterwards, in the time of King *Richard*, the plaintiff entered upon him, and shews the year and day, which was after the statute of *Richard*, de feoffment sur confidence, and the defendant re-entered.

Keble, Serjt. It appears to me that this plea is not good, for two causes. One, because the statute is as well of a thing done before as of a thing done after the statute, and then such execution was good by the statute, for the statute is, "of feoffments, leases, grants, releases, made or to be made," and although it does not speak of executions by statute merchant, still this shall be taken within the letter of the statute, for this is a discharge, *and is in effect but a lease*; and so held all the Court, that the tenant by statute merchant or statute staple shall be taken within the case of the statute, so that execution cannot be sued; *and also the tenant by elegit, &c.* Then when by the statute since made this was a good execution, although he could not enter before the statute, yet when the statute was made, he who had the execution might enter again, which execution is good, because it is in certain, by the issuing of the execution before; and the defendant has shewn in his bar the re-entry by the plaintiff after the making of the statute, for which entry upon the (whole) matter he cannot be punished. As suppose that the lessee taking under a demise by the feoffor, before the statute enters upon the feoffee, and the feoffee ousts him, as he well may, and afterwards the statute is made, and then the lessee enters again; now this entry is lawful, and he cannot be punished for it: so here.

Jay, J. It seems to me the contrary, for although the feoffor had entered before the statute of *Rich.*, and made a (second) feoffment in fee, and the feoffee sur confidence had re-entered upon the (second) fee. Now this (second) feoffment is utterly void, and now although the statute is made afterwards, (and enacts that) as well a thing done before as afterwards shall take effect, still the statute shall not make that (second) feoffment good, because by the entry of the (first) feoffee the (second) feoffment is void. Quære, bene."

In *Goodell* v. *Brigham*, 1 Bos. & P. 195, *Le Blanc*, Serjt. says, "The word 'power' in law may be there defined, viz. *an authority given to one person to be exercised over the estate of another*;" which definition,

merchant, and the Court held that execution should be sued of the land in use, and that the same law is of statute

though adopted by *Buller*, ibid. 198, has since been exploded. *Maundrell* v. *Maundrell*, 10 Ves. 265. This definition, however, appears to be strictly applicable to the power given by 1 *Rich.* 3, c. 8, to feoffors sur confidence, (or rather to cestui que use,) to create a legal estate without being themselves seised. Thus in M. 5 *H.* 7, fo. 5 & 6, pl. 11, a question was demanded by *Fineux* of the justices. If a man has enfeoffed sur confidence, and the feoffor makes a lease for term of years, whether the reversion is in the feoffor or in the feoffee, and the opinion of all the Court, except *Davers*, (*Danvers*, Just. C. P.) was, that the reversion was in the feoffee. And this was their reason: because at the common law the feoffor would have been a disseisor, and now the statute says, that the lease or the feoffment shall be good against the feoffor and the feoffee, and their heirs. The statute gives authority to the feoffor to create such estates, and therefore the feoffor shall not be a disseisor, if he enter and make a lease or feoffment, because the statute gives power to him to do this lawfully, and that for the sole advantage of the lessee, and not for the advantage of the feoffor. Then notwithstanding the statute gives a lawful power to make the lease, yet it does not (give power) to have the reversion thereby. As the statute of *Marlebridge*, c. 6, is, that the lord recover the wardship, still the reversion remains in the feoffee. And also by the common law and custom used, executors may make a feoffment or a lease, by the will of their testator, of lands devisable. And if they make a lease, the reversion is not in them, but in the heir. So one may make a gift, a lease, or a feoffment of land, although he has nothing in the land when he makes it; and so inasmuch as the statute is made for the advantage of the lessee, so that the feoffor may make a lease by authority of the statute, and he shall not be a tort-feasor therein, but may lawfully enter to make a lease, still they shall have nothing in the reversion causâ quâ suprà. Also because this statute was made for the advantage of the lessee or donee, and not for the advantage of the feoffors sur confidence. Still he shall not be a trespasser by the entry and making the lease or feoffment. And this lease or feoffment must be made immediately upon the entry, otherwise he is a disseisor, as if he enters, and a long time afterwards makes a lease or feoffment, that lease or feoffment shall not purge the tort, but notwithstanding that the feoffee shall have assize, quod *Brian* and others concesserunt expressly and clearly, and the opinion of all the Court was, that if the lessee do waste, the feoffee (sur confidence) shall have an action of waste, notwithstanding that he has no privity, for he has no mean to make any privity, as the lord shall have an action of waste after the reversion is escheated &c.

Brian (C. J. of C. P.) said, that if a rent be reserved to himself, (i. e. to the feoffor sur confidence,

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staple *and elegit* by the statute of 1 *Rich.* 3, *for that is in effect a lease.* Thus the lien of the judgment creditor is expressly assimilated to an estate created by the party. It is to be regretted, that the reasons upon which the judges of this Court decided *Ray* v. *Pung* do not appear. It may have been thought that dower only created an inchoate lien. But a judgment is an immediate absolute lien upon the lands of which the debtor is then seised, and becomes a lien upon after-acquired lands from the moment that they vest in the debtor. It is true that in some respects dower is favoured. It is nevertheless looked upon with jealousy, as forming an impediment to the free alienation of property. [Lord *Tenterden*, C. J. A good many contrivances have been resorted to for defeating dower.] Even in equity the title to dower is allowed to be defeated by the assignment of a term *though with notice* (*a*). And in *Mole* v. *Smith* (*b*), a woman was compelled to assign a term for the express purpose of barring her own dower.

The statute of fraudulent devises (*c*) expressly meets the case of a power. That statute, after reciting "that it is not reasonable or just, that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts: and nevertheless it hath often so happened that where several persons having, by bonds *or other specialties*, bound themselves and their heirs, and have afterwards died seised in fee simple of and in manors, messuages, lands, tenements, and hereditaments, *or had power or authority to dispose of or charge the same by their* wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments devised the same, *or disposed thereof*,

the cestui que use.) because he hath not the reversion, as before said, it is void without deed, and to the feoffee it cannot be reserved, because he is a stranger, and thus the rent is void, unless it be by deed. Since the statute of quia emptores terrarum, a man cannot reserve to himself rent without deed, but with deed he can. And so can the feoffor sur confidence,—quod alii justiciarii concesserunt.

(*a*) *Vide ante*, 568.

(*b*) Jacob, 490; 1 Jac. & Walk. 665; *tamen quære.*

(*c*) 3 (or 3 & 4) *Will.* 3, c. 14, altered by 11 *Geo.* 4 and 1 *Will.* 4, c. 47, s. 6, and 3 & 4 *Will.* 4, c. 104.

in such manner as such creditors have lost their said debts," enacts and declares, that all wills and testaments, limitations, *dispositions, or appointments*, of or concerning any manor &c., shall be deemed and taken as against such creditors to be fraudulent and void. It is evident that at the time of the passing of this statute, an *execution* could be defeated by the fraudulent execution of a power of appointment. It cannot be supposed that the legislature would have omitted to provide for judgment creditors, if they had been within the mischief, as, according to the plaintiff's argument, they certainly would have been. It will hardly be contended, that if the estate had been actually vested in the judgment creditors, under an extent upon an elegit, such estate could have been divested by the execution of the power. The principle would extend to protect the estate against a process of extent issued by the crown. Unfortunately for the plaintiff he is met with a direct authority, which deprives him of that protection. In *Rex* v. *Smith* (*a*) it was expressly decided, that an outstanding term does not protect a purchaser against the claim of the crown, in respect of debts due from the seller (*b*). In *Sir*

(*a*) Sugd. Vend. & P. 4th ed. 347. And see the Pleadings, Mann. Exch. Pract. 2d ed. 235.

(*b*) Upon *Rex* v. *Smith* being cited upon the argument in *Rex* v. *Lamb*, Mann. Exch. Pract. 39 n., 247, a copy of the record in the former case was produced, by which it appeared that to a plea of an outstanding term, the Attorney-General replied, that it was a *satisfied* term held in trust for the debtor, and that the case was argued upon a demurrer to the replication. In *Rex* v. *Lamb* it appeared that the land of one *Lacy*, seized under an extent, was claimed by *Lamb*, under a term of 1000 years, created to secure the unpaid portion of the purchase-money upon a sale by a former proprietor to *Lacy*; that upon a sale by *Lacy* to *Turton*, *Turton* paid off the portion of the original purchase-money secured by the term, and took a conveyance of the freehold to himself, and an assignment of the term to *Lamb*; that at the time of the payment of the money, *Turton* had no notice of the debt to the crown. *Rex* v. *Lamb* was argued upon a demurrer to the plea and monstraunce de droit filed by *Lamb*, in assertion of his claim to the property during the term. In support of the demurrer it was insisted, on the part of the crown,

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Christopher Hatton's case (*a*) it was resolved, that the lands of the crown debtor, though subject to a power, were liable to execution. There *A.*, before he became indebted to the crown, being seised of the land in fee, covenanted to stand seised thereof to the use of himself for life, remainder for ten years to the covenantee for payment of debt, remainder to the issue of *A.* in tail, with power of revocation. *A.* died indebted to the crown; it was agreed by the judges and decided by *Crawford*, Master of the Court of Wards, and the whole Court, that the lands were liable to an extent notwithstanding the power of revocation. It is true, that for feudal purposes the appointee is considered as a party coming in under the donor of the power, and not under the immediate appointor, the donee of that power. But for many purposes he is treated as a party taking by conveyance *from the appointor*. Thus, an appointment of real estate, under a power, is within the statute (*b*) against fraudulent conveyances, *Duke of Marl-*

that the title set out by the claimant in his plea and monstraunce de droit, did not affect the right of the crown to take the absolute and unincumbered fee. For the claimant it was urged, that the outstanding term never having been held in trust for *Lacy*, the crown debtor, the property could only be taken by the crown, subject to the estate and interest of the termor. And the Court held accordingly, that although where the term is a satisfied term attendant upon the inheritance, the crown, by acquiring an interest in the inheritance, acquires a corresponding interest in the term, the crown's debt does not affect a term *in gross*, whether legal or equitable, until the teste of the extent, that being the period for which the chattel interests of the crown debtor are bound. And that here the claimant was entitled to judgment, inasmuch as the term of 1000 years was vested not in or in trust for *Lacy*, the crown debtor, but in the original vendor, *Lacy* never having discharged the incumbrance, by paying off the residue of the purchase-money, and by such payment placing the term in the same state as the term in *Rex* v. *Smith*, Mann. Exch. Prac. 250.

(*a*) Godb. 289; *S. C.* 2 Roll. Rep. 294. In Hob. 339, it is said, that in *Sir C. Hatton's* case it was resolved that the lands were subject to the debt at common law, without any averment of fraud. And see *Walter de Cherton's* case, Godb. 293, Dyer, 160 a; *Earl of Devonshire's* case, 11 Co. Rep. 92, 93.

(*b*) 13 Eliz. c. 5.

borough v. *Godolphin* (*a*), and is subject to the other incidents of conveyances. Lord *Hardwicke* says, (*b*) "Every person claiming under the execution of a power must claim, not only according to the power, but according to the nature of the instrument by which that power is executed, and therefore a will, in execution of such a power (supposing it was of lands,) would be alienable or revocable, according to the Statute of Frauds, by cancelling, or any of those methods as a proper will would be, because it is the nature of the instrument which causes that." In *Scrafton* v. *Quincey* (*c*) a deed of appointment of lands, in Middlesex, was postponed to a mortgage executed subsequently, but registered before the appointment (*d*). In *Hurd* v. *Fletcher* (*e*) a fine was levied of the estate of a feme covert, with a power to husband and wife to declare uses. Uses were declared, under which an estate in remainder was limited to *A.* in tail. The husband made a lease, and covenanted for quiet possession against any person or persons *claiming or to claim by, from, or under him.* The lessee being evicted by *A.*, it was held, that the representatives of the husband were liable in covenant, as for an eviction, by a person claiming *under him.* [Lord *Tenterden*, C. J. Mr. *Preston* concedes that a man cannot defeat *his own grant* by the execution of a power.] Lord *Hardwicke*, in a subsequent part of his judgment says (*f*), "I admit the principle, that where a person takes by execution of a power, whether of realty or personalty, it is taken under the autho-

(*a*) 2 Vez. sen. 61.

(*b*) Ibid. 77.

(*c*) Ibid. 413.

(*d*) The deed creating the power bore date in 1742; the appointment was in 1744: the mortgage in 1746. The mortgage was registered in 1746, and the appointment in 1748. The deed creating the power, does not appear to have been registered at all, but no objection was taken on this ground; nor was the circumstance noticed in the judgment.

(*e*) 1 Dougl. 43. But see 2 Sugd. Vend. and Purch. 9th ed. 78, as to covenants in appointments to uses not running with the land. And see *Isherwood* v. *Oldknow*, 3 Maule & Selw. 382; 5 Nev. & Mann. 518, (*a*); *ante*, 200, (*a*).

(*f*) 2 Vez. sen. 78.

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rity of that power; *but not from the time of the creation of that power*. There is no case that the relation shall go back for that which is quite of another nature, and (that is the point which must be contended for here,) that they must take by relation so as to make them take from the time of the creation of the power, for which there is no authority, and that would be unreasonable. The meaning of the expression, that the persons must take *under* the power, or as if their names had been inserted *in* the power, is, that they shall take in the same manner as if the power and instrument executing the power had been incorporated in one instrument;" that is, of the *date* of the latter instrument, "then they shall take as if all that was in the instrument executing had been expressed in that giving the power. So is it in appointments of uses. If a feoffment is executed to such uses as he shall appoint by will, when the will is made, it is clear that the appointee cestui que use is in *by* the feoffment but has nothing *from the time of the feoffment*, so as to vest the estate in him. The estate will vest in him,—according to the nature of the act done, and appointment of the use,—from the time of the testator's death. This, therefore, is not a *relation* so as to make things vest from the time of the power, but according to the time of that act executing that power; not like the referring back in case of assignment in commission of bankruptcy, that is, by force of the statute, and to avoid mesne wrongful acts." A judgment creditor is a purchaser for a valuable consideration, and in equity it is considered as an actual charge upon the land (*a*). In *Ren, lessee of Hall*, v *Bulkeley* (*b*), it was held, that if a tenant for life, with power to grant leases in possession for twenty-one years, at the best rent, convey his life estate to trustees to pay an annuity for his life, and the surplus to himself, the power is not thereby extinguished, but he may still grant a lease agreeable to the terms of the power. In giving judgment in that case Lord *Mansfield* says, "It is contended, that by granting away his life estate,

(*a*) *Vide ante*, 572 n. (*b*) 1 Dougl. 292.

he (Lord *Onslow*, the tenant for life,) extinguished the power. Certainly, when the whole life estate is conveyed away, by the intention of the parties, the power must be at an end, and cannot afterwards be executed to the prejudice of the grantee. *But the conveyance here was only to let in a particular mortgage, subject to which the rents and profits still belonged to Lord Onslow. Roper* v. *Hallifax* (*a*).

Preston, in reply. It is admitted, that if the plaintiff had done any *act* to encumber the estate, he could not have executed the power to the extent of derogating from that act. With respect to the judgment of Lord *Hardwicke*, it is sufficient to say, that in *Maundrell* v. *Maundrell*, Lord *Eldon* says, that "the fee vests until the execution of the power, and the execution of the power is the limitation of a use under and by the effect of the instrument by which the power was reserved," that "when the tenant for life executes the power, the effect is not technically, making a lease; but that lessee, in fact, stands precisely in the same relation to all the persons named in the first settlement, as if that settlement had contained a limitation to his use for twenty-one years, *antecedent to the life estate and the ultimate limitations* (*b*)." [*Bayley*, J. That is, as to persons named in the first conveyance.] It is the same here as if the term of 500 years had been created in the first conveyance. It will be unnecessary to advert to the former statutes respecting uses, these statutes being all repealed by 27 *H.* 8, c. 10. The question is not affected by the remedies given to creditors by the Statute of Frauds, or by the rule of equity framed upon that statute. In *Sir Christopher Hatton's* case there was no taking of the power in execution, but it was held, that the settlement was void as against the Crown, because it was fraudulent, the fraud being evidenced by the revocation of those uses, under which the property was vested in the crown debtor (*c*). Under the bankrupt laws, the commissioners execute a conveyance of the fee, which

(*a*) 8 Taunt. 845; *S.C.* Sugd. Pow. 5th ed. App. No. 4.

(*b*) 10 Ves. 255, 256

(*c*) *Sed vide ante*, 577 (*b*).

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relates back to the act of bankruptcy (*a*), and the act of parliament *seises* the alienee, and will defeat a fee which may have vested in the lord by escheat, as an act of the party, by which he may have bound his own estate. No conveyancer will advise a purchaser to abstain from searching for judgments in the present (*b*) state of the law. If it could be avoided, the convenience would be very great, as the expense of making searches is immense. The usage is to search for ten years (*c*). A purchaser and a judgment creditor are in a very different position. The former may protect himself by taking an assignment of a term, which a judgment creditor cannot do.

In this term the judgment of the Court was delivered by Lord TENTERDEN, C. J., who, after stating the facts found by the special case, proceeded as follows:—The question for the Court was, whether this conveyance, under the power of appointment, defeated the judgment creditor? It has been established ever since the time of Lord *Coke*, that where a power is executed, the person taking under it, takes under him who created the power, and not under him who executes it. The only exceptions are, where the person executing the power has granted a lease, or any other interest, which he may do by virtue of his estate; for then he is not allowed *to defeat his own act* (*d*). But a judgment is not within the exception as an act done by the party, for it is considered as a proceeding *in invitum* (*e*), and therefore falls within the general rule.

(*a*) *Vide ante*, 573.

(*b*) But where an over-reaching power may be exercised, there seems to be no reason why, *since* the decision in the principal case, any search should be made.

(*c*) This seems to be a mere arbitrary period, as judgments may be enforced at any time within *twenty* years; and the *correct* and the only *safe* practice (if not the usage,) appears to be to carry the search back for 20 years, in all cases where a search is necessary.

(*d*) *Vide ante*, 571, 579.

(*e*) So under the statutes of usury it has been held, that usury cannot be pleaded to a scire facias, or an action of debt on a judgment. The statute (13 *Eliz.* c. 8,) which avoids bonds, contracts and assurances, has been held not to extend to a judgment, especially as it was competent to the defend-

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We are therefore of opinion that the nonsuit must be set aside, and a verdict entered for the plaintiff.

Postea to the plaintiff (*a*).

ant to have pleaded the usury to the original action, and not have suffered a judgment, which, instead of a contract or assurance, is *redditum in invitum*. *Middleton* v. *Hill*, Cro. Eliz. 588; Goldsb. 128, *S. C.*; *Rowe* v. *Bellaseys*, 1 Siderf. 182. In the case of a judgment upon a warrant of attorney, where the defendant has had no opportunity of pleading the statute, the proper course is to move to set aside the warrant of attorney, and vacate the judgment. *Rust* v. *Powér*, Cases temp. Hardw. 233, 2 Stra. 1043; *Edmonson* v. *Popkin*, 1 Bos. & Pul. 270. And see *Hindle* v. *O'Brien*, 1 Taunt. 413; *Edmonson* v. *Hawkins*, Peake, N.P. Add. Cases, 173. And where, upon the affidavits in support of, and in answer to the motion, the existence of a corrupt contract appeared to be doubtful, the Court of King's Bench directed an issue. *Cook* v. *Jones*, Cowp. 727. *Vide tamen Mathews* v. *Lewis*, 1 Anstr. 7. And see *Scott* v. *Nesbitt*, 2 Cox, 183; *Scott* v. *Nicoll*, 4 Dougl. 315; *Dalbiac* v. *Dalbiac*, 16 Ves. 124; *Scrivener* Ex parte, 3 Ves. & Bea. 14; *Roberts* v. *Goff*, 4 Barn. & Alders. 92; *Cole* v. *Gill*, 7 B. Moore, 353; *Flight* v. *Chaplin*, 2 Barn. & Adol. 112.

(*a*) So where *A.* surrenders a copyhold to such uses as *B.* shall appoint, and until appointment to the use of *B.* in fee, the lord is bound to admit the appointee of *B.* as the *immediate* surrenderee of *A.*, and cannot require the admittance of *B. Rex* v. *Lord of Manor of Oundle*, 3 Nev. & Mann. 484; 1 Adol. & Ellis, 283. And where lands stand limited to *A.* for 1000 years, and subject thereto, to *B.* for life, remainder to *C.* for 2000 years, remainder to *D.* for life, remainder to trustees to preserve, &c., remainder to the issue of *D.* successively in tail, with the ultimate remainder to the heirs of *D.*; and the trusts of the first term are, upon non-payment of 800*l.* lent by *A.* to *D.* to raise that sum by sale, mortgage, &c.; and the trusts of the second term are, to repay to *B.* any interest paid by *B.* to *A.*, and to raise a further sum for *B.*; power to *B.* to demise for ten years, or for seven years from *B.*'s death, to take effect in possession, reserving the best rent, &c., and *B.* demises under the power, for seven years from her death, to *E.*, reserving rent to *D.*, or to the person entitled for the time being to the freehold or inheritance: the lease takes effect as an appointment under the power, *in advance of the term* for 1000 years. *Rogers* v. *Humphreys*, 5 Nev. & Mann. 511. And see *Lord Abergavenny's* case, 6 Co. Rep. 78; *Leonard Lovie's* case, 10 Co. Rep. 78; *Idle* v. *Cooke*, 2 Lord Raym. 1150; *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 40; *Campbell* v. *Sandys*, 1 Sch. & Lefr. 293; *Harris* v. *Booker*, 4 Bingh. 96; 12 B. Moore, 283; *ante*, 195, (*c*); *Harris* v. *Pugh*, 4 Bingh. 335; 12 B. Moore, 577.

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Where the plaintiff, in a qui tam action for usury, sued out his writ in September, 1828, delivered his declaration in Trinity term, 1829, took the record down for trial at the summer assizes, 1829, and then withdrew the record, the Court refused to allow him to amend his declaration.

DEBT for penalties under the Statute of Usury, 12 *Ann.* st. 2, c. 16. The alleged usury was committed in April, 1827. The writ was sued out in September, 1828. The declaration, containing fifty-two counts, was delivered in Trinity term, 1829. The plaintiff took down the record for trial at the summer assizes for the county of Essex, in 1829, but withdrew the record. A rule nisi to amend the declaration, by adding sixteen counts, was obtained in Michaelmas term, 1829; against which

Brodrick now shewed cause. It is a general rule that the Court will not permit any amendment to be made in a penal action, where the plaintiff has been guilty of delay in carrying on the suit; *Rankin q. t.* v. *Marsh* (*a*), *Steel* v. *Sowerby* (*b*). This case is clearly within that rule, for the plaintiff has suffered two assizes to elapse since the action was commenced.

Scarlett, A. G., contrà. The rule referred to applies only in cases where there has been great and unreasonable delay, as in *Goff* v. *Popplewell* (*c*), where the action had been depending four years. In *Mace q. t.* v. *Lovett* (*d*), a declaration in an action for usury was amended, after the record was made up, carried down for trial, and withdrawn by the plaintiff. In *Cross* v. *Kaye* (*e*), the Court allowed a plaintiff to amend his declaration in a penal action, after the time limited for bringing another action. He also cited *Maddock q. t.* v. *Hammett* (*f*).

(*a*) 8 T. R. 30.
(*b*) 6 T. R. 171.
(*c*) 2 T. R. 707.
(*d*) 5 Burr. 2833
(*e*) 6 T. R. 543.
(*f*) 7 T. R. 55. And see *Bonfield*, q. t. v. *Milner*, 2 Burr. 1098; *Petre* v. *Craft*, 4 East, 433; *Dover* v. *Mestaer*, 4 East, 435, and 1 Smith, 123; *Woodroffe* v. *Williams*, 6 Taunt. 19, 1 Marsh. 419; *Solomons* v. *Jenkins*, 2 Chitt. Rep. 23; *Anon.* ibid. 45; *Wright* v. *Ager*, 5 B. Moore, 330.

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Lord TENTERDEN, C. J.—The statute has limited the time within which a penal action like the present shall be *commenced;* clearly intending also, that such an action shall be *prosecuted* without delay. I think a party who, after he has commenced such an action, has been guilty of any delay, is not entitled to any indulgence. Here, the action was commenced in September, 1828, and the plaintiff did not declare till Trinity term, 1829, and then did not proceed to trial at the next assizes. The time which has elapsed is so great, that I think this rule ought to be discharged.

The other judges concurred.

Rule discharged (*a*).

(*a*) And see further as to pleadings under the statutes of usury, *Beete* v. *Bidgood*, *ante*, vol. i. 143; *Solarte* v. *Melville*, *ibid.* 198; and the notes to those cases; *ante*, 582, note (*c*).

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

EASTER TERM,

IN THE ELEVENTH YEAR OF THE REIGN OF GEORGE IV.

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WORSWICK, Administrator of WOOD, *v.* BESWICK.

In an action of trover in the King's Bench by bill, payment to the plaintiff, after the writ and before the declaration, of a sum in satisfaction of the damages and costs, may be given in evidence under the general issue, and will be an answer to the action.

TROVER for household furniture, the property of the plaintiff as administrator. Plea: not guilty, and issue thereon. At the trial before *Parke*, J., at the last Lancashire assizes, the case was this:—

In August, 1829, the defendant had sold certain goods which belonged to the plaintiff as administrator of *Wood*, and kept the proceeds. On the 14th of December, 1829, the plaintiff issued a latitat against the defendant, returnable in Hilary term, 1830, when the declaration was filed. On the 16th of January, 1830, the defendant, without communicating with the plaintiff's attorney, paid over to the plaintiff the amount produced by the sale of the goods, after deducting expenses; and there was evidence that the plaintiff was, at the time, satisfied with that payment. It was contended, on the part of the defendant, that evidence of this payment was receivable under the general issue, and that, being received, it was an answer to the action. For the plaintiff, on the other hand, it was insisted that the latitat was the commencement of the action, and that nothing done after that could be given in evidence under the

general issue, so as to defeat the action; and, further, that the supposed settlement of the cause was a fraud upon the plaintiff's attorney, and that, in either view of the case, the plaintiff was entitled to a verdict for nominal damages. The learned judge was of opinion that the evidence was receivable, and that, if the plaintiff received the money in satisfaction of his claim for damages and costs, it was an answer to the action, unless the jury found the transaction fraudulent; and he directed the jury to find for the defendant, if they thought that the money was received in satisfaction, and that the transaction was not fraudulent, for the purpose of depriving the plaintiff's attorney of his costs. The jury found a verdict for the defendant; but the plaintiff had leave to move to enter a verdict in his favour, with nominal damages, if the Court should be of opinion that the ruling of the learned judge was wrong.

Alderson now moved accordingly. The jury have found that the money was received in satisfaction; and they have negatived fraud: still the question remains, whether evidence of the settlement of the action brought ought to have been received in evidence, in answer to the action, under the general issue. It is submitted that it ought not. In *Lee* v. *Levy* (*a*) it was held, that matter of defence arising after action brought could not be pleaded in bar of the action generally, and therefore could not be given in evidence under the general issue. There *Abbott*, C. J., said, "The question, whether matter of defence arising after action brought could be pleaded generally in bar of the action, was very fully discussed in the case of *Le Bret* v. *Papillon* (*b*). That case decided that no matter of defence, arising after action brought, can properly be pleaded in bar of the action generally, but ought to be pleaded in bar of the *further* maintenance of the suit; and it was founded on

(*a*) 6 D. & R. 475. *S. C.* 4 B. & C. 399; 1 C. & P. 553, 675.
(*b*) 4 East, 502.

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the authority of *Evans* v. *Prosser* (*a*). [*Parke*, J. The payment in this case was before declaration, which upon the record appears to be the commencement of the action.] The real question is, what is to be deemed the commencement of the action? Where the time is material, the plaintiff is always at liberty to treat the issuing of process as the commencement of the suit; for instance, to shut out a tender between the writ and the declaration, or to prevent the statute of limitations from operating. In *Holland* v. *Jourdine* (*b*) it was held, that even payment of the debt and costs, after the issuing of the writ, would be no answer to the action under the general issue; but that the plaintiff would be still entitled to a verdict for nominal damages. [*Littledale*, J. That was a case in the Common Pleas, where the writ is always considered as the commencement of the action, and therefore does not apply to a case in this Court, where the practice is different.]

Lord TENTERDEN, C. J.—I think we ought not to grant any rule in this case. In proceedings by bill in this Court, the declaration is considered as the commencement of the action, unless, for the purposes of justice, the plaintiff is allowed to shew an earlier commencement by the suing out of the writ. The instances put, of avoiding a tender after the writ, and of replying the writ to save the statute of limitations, are only exceptions to that general rule. In this case the jury have found that the money was paid and received in satisfaction of the costs as well as the damages; and they have negatived fraud. If, therefore, we allowed the writ to be considered as the commencement of this action, it would have the effect of defeating instead of advancing justice. This is the same, in effect, as a plea

(*a*) 3 T. R. 186, where it was held that a plea of set-off, that the plaintiff was indebted to the defendant "at the time of the plea pleaded," was bad: it should state that he was indebted "at the time of the commencement of the action."

(*b*) Holt's N. P. C. 6.

of accord and satisfaction as to damages and costs before bill filed; and in such a case, a replication of a latitat sued out before satisfaction would be bad. I am, therefore, of opinion that the ruling of the learned judge was right.

BAYLEY, J., and LITTLEDALE, J., concurred.

PARKE, J.—The plaintiff may, if he pleases, treat the writ as the commencement of his action; but if the defendant in this case had pleaded the facts which he proved in bar of the action and costs generally, a replication that the writ was sued out before the payment would have been bad, for the plea would have disclosed matter which would have been an answer to the writ as well as the action. In the instances put in argument, the plea is no answer to the writ; and, therefore, the replication is good.

Rule refused.

THOMAS FISHER and MALACHI FISHER, Assignees of GEORGE ORD HOULISTON, a Bankrupt, *v.* BOUCHER, Esq.

A mere order to deny a trader to a creditor, where no actual denial takes place, and no act of concealment is done, does not constitute an act of bankruptcy by beginning to keep house with intent to delay creditors.

ASSUMPSIT for money had and received. Plea: non assumpsit, and issue thereon. At the trial before *Gaselee*, J., at the last assizes for the county of Dorset, it was admitted that a commission of bankrupt had issued against *Houliston*, under which he had been declared a bankrupt, and the plaintiffs had been appointed his assignees, and that the defendant, as sheriff of Dorsetshire, had seized certain effects of *Houliston* under a writ of fi. fa.; and the only question in the cause was, whether *Houliston* had or

A departing by a trader from his dwelling-house with the intention not to return if a given event occurs, which does not occur, whereupon the trader returns in the ordinary course, does not constitute an act of bankruptcy, by departing from the dwelling-house with intent to delay creditors.

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had not committed an act of bankruptcy; as to which the evidence was as follows:—

Houliston had been a grocer, carrying on business at Blandford, in the county of Dorset. On the 11th of June, 1829, he received a letter from *Francis* & Co., of London, who had supplied him with goods, threatening to arrest him unless a debt of 70*l.* were paid them. On the 15th of June *Houliston* wrote a letter to the plaintiff, *Thomas Fisher*, to whom he was indebted 600*l.*, informing him that, on taking stock, he found it was impossible for him to meet his creditors in full, and that he feared his estate would pay little more than 10*s.* in the pound. He then proposed to assign the whole of his property to *Fisher* in trust for the benefit of himself and the other creditors, adding, that it was of the utmost importance that some arrangement should be made immediately, as he was threatened to be arrested for 70*l.*, which he was then unable to pay, though he was confident of being able at some future day to pay the full amount, if his affairs could be so arranged as to prevent his property being wasted in law. On the same day he called his shopman into the parlour behind the shop, told him that *Francis* & Co. had threatened to arrest him, and that he had written to *Fisher*, his principal creditor, and that probably his goods might be seized; and desired him, if *Pitney*, the sheriff's officer, came to the door, to say that he (*Houliston*) was not at home. On the 17th of June, being Wednesday, he told his wife that he was going out, and that if any thing particular happened, she was to send to him at the Shillington turnpike gate. He then left home, for the avowed purpose of going his journey through Durweston, Shillington, and other places in the neighbourhood, to deliver goods which had been previously ordered, and to take fresh orders, in the usual course of his business. It had, however, been his habit on former occasions to take this journey on a Tuesday morning, and to start between eight and nine o'clock: on this occasion he started soon after seven on a

Wednesday morning, before the London mail had arrived, by which a letter might have been received by him from his creditors, *Francis* & Co., or a warrant by *Pitney*, the sheriff's officer, to arrest him. He went on slowly through Durweston, without calling at any house, and through the Shillington turnpike gate, and stopped at a house a short distance beyond the gate, where he went in, left a small parcel, and settled an account; and there he waited till the mail cart came up, when the driver delivered to him a letter from *Francis* & Co., which had been received at his house after he left it. That letter contained the following passage:—"We are not inclined to be unnecessarily harsh in the arrangement of our account. You say you can pay 10*s*. in the pound now, and the remaining 10*s*. at some future time. Let us have a good guarantee for the payment of the first 10*s*. at as short a date as can be accomplished, and we will take your own note for the remaining 10*s*., payable some time hence, provided the time be not too long." Having read this letter, *Houliston* wrote with a pencil on the back of it, "I shall now return with comfort to my wife and children," and sent it to his wife by a private messenger. He then went on to Tippy Oakford, the next village to Shillington, called at one house there, and then returned home by a different route from that which he usually took. On the same morning, before he left home, his wife had packed up some clothes for him in a deal box, which he was in the habit of taking with him when he went on a long journey. Upon this evidence it was contended, on the part of the plaintiffs, that *Houliston* had committed two acts of bankruptcy; first, by beginning to keep house, he having given orders to be denied to the sheriff's officer; secondly, by departing from his dwelling-house;—each with intent to delay his creditors. The learned judge was of opinion that *Houliston* had not committed any act of bankruptcy by beginning to keep house with intent to delay his creditors, the direction given to the shopman to deny him to the sheriff's officer, if he called,

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being evidence only of an intention to delay his creditors, and not of an actual beginning to keep house for that purpose. Upon that point, however, his lordship reserved liberty to the plaintiffs to move to enter a verdict in their favour, in case the Court should be of opinion that the facts proved amounted to a beginning to keep house. Upon the other point, the learned judge was of opinion that the question, whether *Houliston* had committed an act of bankruptcy by departing from his dwelling-house, depended upon the intention which he had at the time when he so departed. If at that time he intended not to return unless he should receive a letter from *Francis* & Co. and should be satisfied with its contents, that might be a departure with intent, in a given event, to delay his creditors, and might, possibly, constitute an act of bankruptcy; but if he departed from his dwelling-house to go his usual rounds in the ordinary course of his business, intending to return, that was not a departing with intent to delay his creditors, and, consequently, not an act of bankruptcy: and his lordship left it to the jury to say, whether *Houliston* departed from his dwelling-house on the morning of the 17th of June with intent to delay his creditors, or merely to go his usual rounds in the ordinary course of his business. The jury found that *Houliston* did not depart from his dwelling-house on the morning of the 17th of June with intent to delay his creditors, but to go his usual rounds in the ordinary course of his business. A verdict, therefore, was entered for the defendant.

Wilde, Serjt., now moved, agreeably to the leave reserved, to enter a verdict for the plaintiffs, on the ground that *Houliston* had committed an act of bankruptcy by beginning to keep house; or for a new trial, upon the ground that the finding of the jury, as to the intent with which *Houliston* departed from his dwelling-house, was against the weight of evidence.

First, there was a beginning to keep house, with intent

to delay creditors, such as constituted an act of bankruptcy. An intent to delay is sufficient, although no creditor is actually delayed; *Lloyd* v. *Heathcote* (*a*); and the order here given to be denied to the sheriff's officer, who was expected to call with a writ at the suit of *Francis* & Co., was sufficient evidence of an intent to delay them. A mere order of denial given by a trader, though no denial may take place, is evidence that he desires to conceal himself from the creditor who is to be denied; and the desire to conceal himself from a creditor can only be with intent to prevent or delay that creditor from recovering his debt. In *Harvey* v. *Ramsbottom* (*b*) a trader ordered his servants not to let any one into the house whom they did not know, stating that he was afraid of being arrested. The next day the servants did not open the door without ascertaining from the windows what persons required admittance, and the outer gate of the house was kept locked. That was held to constitute an act of bankruptcy, by beginning to keep house, though no creditor was actually denied or delayed. These cases shew that it is not necessary, in order to constitute an act of bankruptcy by beginning to keep house, that any creditor should be actually denied, or actually delayed: therefore *Houliston*'s order to be denied to the sheriff's officer was of itself an act of bankruptcy, although the sheriff's officer did not call.

Secondly, the finding of the jury with respect to the intention with which *Houliston* left his dwelling-house, was against the weight of evidence. The circumstances attending his departure clearly shew that he did not intend to return; and if he did not intend to return, he did intend to delay his creditors. What are those circumstances? Impressed with a strong apprehension of being arrested—his wife having previously packed up his clothes—he sets out upon a journey, on an unusual day and at an unusual hour.

(*a*) 2 Brod. & Bingh. 388; 5 B. Moore, 129.

(*b*) 2 D. & R. 142; 1 B. & C. 55.

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Having gone a short distance, he waits till he receives a letter, which relieves him from his apprehension of arrest; he says, "I can now return in comfort to my wife and children;" and he then abandons his journey, and returns home by an unusual route. The object, therefore, for which he left home, was to avoid being arrested; and to effectuate that object his intention was, not to return home unless the letter which he expected proved favourable, and enabled him to do so safely. That being the case, it is clear that he departed from his dwelling-house on that occasion with intent to delay his creditors.

Lord TENTERDEN, C. J.—I think we ought not to grant any rule in this case. Two points have been made before us: one depending upon a question reserved by the learned judge who tried the cause; the other depending upon the propriety of the finding of the jury. The question reserved by the learned judge is, whether *Houliston* committed an act of bankruptcy, by beginning to keep house. It appears by the evidence that he had given directions to his shopman, if the sheriff's officer called at the house, to say he was not at home. If he had followed up that order by withdrawing himself to a part of the house which he did not usually occupy, that would have been evidence of a beginning to keep house with intent to delay his creditors, although no creditor was actually denied or delayed; but he did nothing of that kind. We should be going much further than any authority will warrant us in doing, if we were to hold that a mere direction given by a trader to his servant to deny him to his creditors generally, or to any particular creditor by name, not followed up by an actual denial, or by any other act which is evidence of an actual beginning to keep house, was an act of bankruptcy. Here the facts proved were evidence of an intent to begin to keep house in case the sheriff's officer should call, but not of an actual beginning to keep house. Then, as to the finding of the jury with respect to the other sup-

posed act of bankruptcy. Construing the evidence most favourably for the plaintiffs, it appears that there was nothing more than an inchoate intention by *Houliston* to delay his creditors, by not returning to his dwelling-house, in case a particular event happened. That event not having happened, he did in fact return to his dwelling-house, according to his usual habits. That was a departure, not with an absolute, but only with an inchoate intent to delay; and I am not aware that that has been ever held to constitute an act of bankruptcy. Besides, there was ample evidence to warrant the jury in finding that he departed from his dwelling-house with an intent to go his rounds in the usual course of his business, and not with an intention to delay his creditors; and that being so, there is no ground for saying that he committed an act of bankruptcy, by departing from his dwelling-house with intent to delay his creditors.

BAYLEY, J.—Upon the second point, the departing from the dwelling-house, the jury have found that *Houliston* departed from his dwelling-house for the purpose of going his rounds in the usual course of his business, and not with intent to delay his creditors; and I cannot say that they were not justified by the evidence in coming to that conclusion. But looking at the evidence independently of the finding of the jury, and taking it most favourably for the plaintiffs, I should doubt whether there was any departure with intent to delay creditors; for the bankrupt, at most, only intended to delay his creditors in case a given event should occur. That event did not occur; therefore the intent was never more than inchoate. If the letter had proved unfavourable, and he had delayed, even for a short time after receiving it, to return home, that might have been an act of bankruptcy, by absenting himself. However, the jury, by their finding, have negatived any such act of bankruptcy; and I see no ground for disturbing that finding.

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Then, upon the first point, the beginning to keep house. I am not aware that the mere giving directions by a trader to deny him to a creditor, unless there be some act done to shew that he began to keep house, is an act of bankruptcy. If *Houliston*, to prevent his being seen, had retired into a secluded part of the house or adjoining premises, or if there had been an actual denial to a creditor, by his order, then such acts would have been evidence of a beginning to keep house. The two cases that have been cited were very different from the present. In the first of them, *Lloyd* v. *Heathcote* (*a*), there was an order to deny all creditors generally, and an actual denial of a particular creditor, and when that creditor called, and was denied by the bankrupt's wife, the bankrupt retreated into the garden, which shewed that he intended to withdraw himself from the view of persons who called. In the other case of *Harvey* v. *Ramsbottom* (*b*) there were not only directions to be denied, but the doors of the house were kept shut, and no person was admitted until it had been ascertained by the servants from the window who he was. Moreover, in that case the bankrupt removed from one apartment of his house to another to avoid being seen by a person who called, and whom he supposed to be a creditor; so that he was not conducting himself in his usual manner in his own house, but was actually concealing himself from a supposed creditor. All the authorities concur to shew that a mere direction given by a trader to deny him is not an act of bankruptcy, unless that direction is followed by an actual denial, or by concealing himself, or by some other act which is evidence of a beginning to keep house. A locus pœnitentiæ is allowed to the debtor; for notwithstanding his direction, he may, before a creditor calls, revoke it, and elect to see him; and in that case there would be no beginning to keep house. Unless the direction is followed by

(*a*) 2 Brod. & Bingh. 388; 5 B. Moore, 129.

(*b*) 2 D. & R. 142; 1 B. & C. 55.

some act done in pursuance of and consistent with the direction, it is not an act of bankruptcy.

LITTLEDALE, J.—I also think that the question, whether there was a "departing from the dwelling-house within the meaning of the bankrupt act, was properly left to the jury, and that their conclusion was warranted by the facts of the case. It appears by the evidence, that *Houliston*, when he departed from his house, doubted whether he should return. He probably intended, if the letter from *Francis* & Co. was unfavourable, not to return; and if so, he also intended, in that case, to commit an act of bankruptcy. But the letter having turned out favourably, he did not carry that intention into effect. I cannot say that this was a departing from the dwelling-house with intent to delay creditors.

As to the question, whether there was a beginning to keep house within the meaning of the bankrupt act,—according to the earlier cases on that subject it seems for some time to have been considered that an actual denial was indispensable to prove an act of bankruptcy by beginning to keep house; but it has since been settled that a denial is not the only evidence of a beginning to keep house,—that it may be proved by other circumstances. In this case, if there had been any thing to shew that *Houliston*, after he had given directions to be denied, had not conducted himself in his house in his usual manner,—that he had withdrawn himself into a retired part of his house, contrary to his ordinary habits,—I think that would have been evidence of a beginning to keep house: but there must be some act done by the trader to shew that he actually began to keep house. Here, the direction given by *Houliston* to deny him to the sheriff's officer, was evidence of an intent to keep house, and thereby to delay the creditors; but it was not followed up by any act shewing that he had actually begun to keep house.

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PARKE, J.—I am of the same opinion. As to the departure from the dwelling-house, I think the question was properly left to the jury, and that their conclusion was right. *Houliston* may possibly have intended to do that which would have amounted to an act of bankruptcy, if the information he should receive at the turnpike proved unfavourable. It was more favourable than he expected; he returned to his dwelling-house according to his usual habit; and there was no act done out of the ordinary course.

As to the other alleged act of bankruptcy, the beginning to keep house, the authorities go no further than this;—that an actual denial to a creditor is not necessary to constitute a beginning to keep house, but that it may be shewn by other circumstances. It may be sufficient if the creditor is excluded from the debtor while he remains in or about his house. Here the case stops at the fact, that *Houliston* gave directions to his shopman to deny him to the sheriff's officer, if he called. That shewed an intention to delay his creditors; but the mere intention to delay creditors, without any act done, is not a beginning to keep house.

Rule refused.

WOOD and another *v.* GRIMWOOD.

A., having lent *B.* a sum of money, agreed to continue the loan for one year, from September, 1826, to September, 1827, on condition that *B.* would pay a bonus in the first instance, and legal interest upon the sum lent half-yearly. *B.* paid the bonus in January, 1827, and legal interest upon the money lent half-yearly, in April and October, 1827. In June, 1828, an action was commenced against *A.* for usury:—Held, that the action was not commenced within one year after any offence committed, for that the only offence committed was complete in April, 1827, when the first payment of interest was made, and that the bonus could not be apportioned to the second payment of interest, so as to render that usurious.

DEBT for penalties under the Statute of Usury, 12 *Ann.*, st. 2. c. 16. The first count in the declaration stated, that 5000*l.* had been lent by the defendant to *J. B.*, *R. B.*, and *J. B.*, the younger, and secured to him by their promissory note, and that 3000*l.* had been lent by him to the same

persons, and secured to him by their bond; that it had been agreed that the 5000*l.* should be further secured by a mortgage to be granted by *J. B.* and *R. B.*; that the said sums had been forborne by the defendant upon the note and bond, before and from the 9th of September and 28th of September, 1826, respectively, until the time of the contract next mentioned; that on the 4th of October, 1826, it was corruptly agreed between the defendant and *J. B.*, that the defendant should sell certain beans and barley to *J. B.*, at prices far exceeding their value, and should take, by way of shift, the difference between the prices and the true value thereof as a bonus for the further forbearing of the said sums as next mentioned, over and above 5*l.* per cent. to be also paid upon them while forborne; such prices to be paid at three months' credit: that the defendant, in pursuance of that contract, forbore the 5000*l.* upon the note until the execution of the mortgage next mentioned, and, from its execution, upon the mortgage, until the 8th of September, 1827, and forbore the 3000*l.* upon the bond until the 28th of September, 1827: that on the 25th of October, 1826, *J. B.* and *R. B.* executed a mortgage, bearing date the 9th of September, 1826, in which the 5000*l.* was mentioned as a sum lent by the defendant and one *J. C.* to *J. B.* and *R. B.*, and was made payable to the defendant and *J. C.*, at the expiration of one year from the date, with interest at 5*l.* per cent., payable on the 8th of March and 8th of September ensuing the date: that on the 10th of January, 1827, the defendant was paid the prices agreed upon for the beans and barley, amounting to 760*l.* 10*s.*, and took the said difference, amounting to 114*l.* 12*s.* 8*d.* as a bonus as aforesaid: that on the 25th of April, 1827, the defendant and *J. C.* took from *J. B.* and *R. B.*, 125*l.* for forbearance of the 5000*l.* from the 9th of September, 1826, to the 8th of March, 1827, and the defendant took from *J. B.*, *R. B.*, and *J. B.* 75*l.* for forbearance of the 3000*l.*, from the 28th of September, 1826, to the 28th of March, 1827: that on the 28th October, 1827, the defendant took

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200*l.*, for forbearance of the 5000*l.* and the 3000*l.*, that is to say, 125*l.* from *J. B.* and *R. B.*, for forbearing the 5000*l.* from the 8th of March, 1827, to the 8th of September, 1827, and 75*l.* from *J. B.*, *R. B.* and *J. B.*, for forbearing the 3000*l.* from the 28th of March, 1827, to the 28th of September, 1827; and that the defendant, by so taking the 200*l.* over and above the bonus, and the other sums, took above 5*l.* per cent. &c., contrary to the form of the statute, &c. Plea: Not guilty, and issue thereon. At the trial before *Bayley*, J., at the last assizes for the county of Essex, the counsel for the plaintiff stated the facts disclosed in the former action, between the same parties (*a*), and also the following additional facts:—that the payment of the 760*l.*, the stipulated price of the beans and barley, in January, 1827, exceeded the market price by 114*l.*; that by the mortgage deed the 5000*l.* was payable at the end of one year, with 5*l.* per cent. interest, payable half-yearly, on the 8th of March and 8th of September; that in pursuance of that deed, 125*l.*, half a year's interest, due on the 8th of March, 1827, was paid in April to the defendant; that 125*l.*, another half year's interest, due on the 8th of September, 1827, was paid to the defendant in October, 1827; and that the present action was commenced on the 28th of June, 1828. The learned judge, after hearing this statement, being of opinion that if all the facts contained in it were proved in evidence, the plaintiffs would not be entitled to recover, or even to call upon the defendant for an answer, directed a nonsuit, which was submitted to. The ground of his lordship's opinion was, that the action was not commenced within the time limited by the statute, namely, one year after the alleged usury was committed, the usury being complete in April 1827, when the first half-year's interest reserved by the mortgage deed was paid, and the defendant having received only legal interest in October, 1827, when the second half-year's interest was paid.

(*a*) Set out *ante*, p. 551.

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Stephen, Serjt. now moved to set aside the nonsuit, and for a new trial. The action was commenced in due time. There were two offences of usury committed, and the action was brought within a year from the commission of the second of them. The bonus was taken by the defendant as a consideration for the forbearance of the principal money lent during the period of one whole year, and though the whole of that was received at once, still, as the interest was received half-yearly, a portion of the bonus must be considered as forming a part of the consideration for the forbearance during each half year. It follows, then, that although the defendant committed one offence of usury, when he received the first half-year's interest reserved by the deed, he committed another distinct offence when he received the second half-year's interest. *Wade* v. *Wilson* (*a*), upon the authority of which this case was disposed of at nisi prius, does not seem inconsistent with this view of the transaction. There the contract was for the loan of 600*l.*, for a year, reserving interest payable half-yearly, at the rate of 5*l.* per cent., but a premium of ten guineas was paid in the first instance. The action was brought upon the payment of the first half-year's interest, and it was contended, that the loan being for a year, and the premium paid for that time, the usury was not complete till the end of the year, when the whole interest was received in addition to the premium. But the Court held, that the usury was complete upon the lender's receiving any part of the growing interest within the year; *Lawrence*, J., observing, that there was a premium of ten guineas paid at first, *which was to run through the whole year;* and *Le Blanc*, J. expressing his opinion, that at least one moiety of the premium was to be apportioned to the half-year's interest which was received, and that the true spirit of the agreement was, that *the premium was to run through the whole year, in proportion as the interest accrued.* Now, though the decision in that case is an express authority to shew, that one offence of usury was

(*a*) 1 East, 195.

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committed here when the first half-year's interest was received, it is not at all inconsistent with the inference arising from the opinions expressed by *Lawrence*, J. and *Le Blanc*, J., namely, that a second and distinct offence was committed when the second half-year's rent was received. In *Scurry* v. *Freeman* (*a*), *A.* lent *B.* 500*l.* upon his bond, and an assignment by way of mortgage of leasehold premises, and at the time of the loan it was agreed that the latter should give something more than legal interest as a compensation, but no particular sum was specified. After the execution of the deeds, *B.* gave *A.* 50*l.*, and paid interest at the rate of 5*l.* per cent. on the 500*l.*, for five years, at the end of which an action was brought against *A.* for usury, founded on the receipt of the last half-year's interest. It was held, that the action was not barred by lapse of time, for the loan was substantially for no more than 450*l.*, and consequently the interest, at the rate of 5*l.* per cent. on the 500*l.* received within the last year, was usurious. That case is an authority to shew that the present action is maintainable in respect of the second half-year's interest received by the defendant, that interest being, coupled with a portion of the bonus, usurious; because it shews, that a bonus originally taken renders all subsequent payments of interest, though not in themselves exceeding 5*l.* per cent., usurious, and that every such payment constitutes a distinct offence.

Lord TENTERDEN, C. J.—I am of opinion that the action in this case was not commenced in due time, and that the nonsuit, therefore, was right. The facts of the case were shortly these:—Prior to September, 1826, the defendant had advanced the *Brightwens* 5000*l.*, which was partially secured by their promissory note, and which it was agreed should be further secured by a mortgage to be afterwards executed. Before the time arrived for the execution of the mortgage, the defendant gave the *Brightwens* to understand, that he would not complete it unless they would

(*a*) 2 Bos. & Pul. 381.

purchase of him some beans and barley, at a much higher price than they would have fetched in the market; and they agreed to do so. The mortgage deed was executed on the 25th of October, 1826, but was dated on the 9th of September in that year. The 5000*l.* was payable at the end of one year, with interest at 5*l.* per cent., payable half-yearly, on the 8th of March and 8th of September. In January, 1827, 760*l.*, the stipulated price of the beans and barley, was actually paid to the defendant, exceeding the market price by 114*l.* On the 25th of April, 1827, 125*l.*, the half-year's interest, due by the mortgage deed on the 8th of March, was paid to the defendant. On that day, therefore, the defendant had actually received 239*l.* for the forbearance of 5000*l.* for half a year, and an action might then have been brought against him for the penalty, namely, treble the amount of the money lent. No such action was brought. On the 8th of September, 1827, another half-year's interest became due, for which, on the 25th of October, another sum of 125*l.* was paid to the defendant. The present action was commenced on the 25th of June, 1828, more than a year after the payment of the interest made in April, but less than a year after the payment made in October. It is clear, therefore, that no more than the legal interest was received in October, 1827, unless we can consider part of the bonus of 114*l.* as having been then paid; but as the whole of that was in fact paid in January, we cannot, especially for the purpose of subjecting the defendant to a penalty, consider any part of it, contrary to the fact, as having been paid in October. Our present decision will not militate against that in the case of *Wade* v. *Wilson* (*a*). It was not decided there that an action for penalties was maintainable in respect of the 5*l.* per cent. interest received for the last half-year; but merely that the receipt by the defendant of interest received for the first half-year, which, with what he had before received, amounted to more than 5*l.* per cent., constituted usury: and in deciding that, the Court decided

(*a*) 1 East, 195.

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all that was necessary for that case. *Scurry* v. *Freeman* (*a*) was decided on the ground that the amount of the actual loan must be deemed to have been 450*l.* only, and not 500*l.*, and that therefore the receipt of 25*l.* for one year's interest was usurious. In this case the facts are very different, and I think we should be doing great violence to the words of the act of parliament, if we were to hold that in this case more than 5*l.* per cent. interest was received within the year before the action was commenced.

LITTLEDALE, J.—I think we ought not to grant any rule in this case. Here is a contract for a loan of 5000*l.*, secured in the first instance by a promissory note, and agreed to be afterwards secured by a mortgage. Before the mortgage is executed, the lender, the defendant, informs the borrowers that he will not complete the mortgage unless he has a bonus. They agree to give a bonus, and do give it by paying him a sum of 114*l.* in January, 1827. The mortgage deed, bearing date on the 9th of September, 1826, is executed in October in that year. The first half-year's interest reserved by that deed becomes due on the 8th of March, and is paid on the 25th of April, 1827. By the payment of that money the usury was complete, for the defendant had then received a sum exceeding the amount of interest, at the rate of 5*l.* per cent. upon the money lent. I think the 114*l.* cannot be extended over the whole period for which the money was lent, and apportioned to the several payments of interest, in order to make the party receiving in regular course the half-yearly payments of legal interest, guilty of usury. But even if the bonus were divisible and could be apportioned over the whole period for which the loan was to continue, I doubt whether any action for penalties could be maintained after the receipt of the first half-year's interest, because the offence was complete at that time. The defendant had then taken more than 5*l.* per cent. in respect of the corrupt contract, and had thereby subjected himself

(*a*) 2 Bos. & Pul. 381.

to the penalty imposed by the statute, of treble the sum lent; and the statute does not subject a party to a second penalty for taking usurious interest a second time, in respect of one and the same contract.

PARKE, J.—I am of the same opinion. The only sum received by the defendant within one year before the commencement of this action, was 125*l.*, the second half-year's interest at 5*l.* per cent. upon the original loan, due on the 8th September, 1827. That was, primâ facie, legal interest, and no offence against the statute was committed by the receipt of it. But it is said that the bonus of 114*l.* was paid for the forbearance of the 5000*l.* for the whole year, and that a portion of it must be considered as paid for the forbearance during the last half-year, the interest for which was received within one year before the commencement of the action. Upon principle, I cannot concur in that argument, and no authority has been cited in support of it, for it is founded entirely upon some expressions reported to have fallen from *Lawrence*, J. and *Le Blanc*, J. in *Wade* v. *Wilson* (*a*), which cannot be adopted as an authority, having been extra-judicial, and not at all necessary to the decision in that case. But even admitting that argument to be correct, I cannot agree to the conclusion attempted to be drawn from it—that an action for penalties is maintainable against the defendant for the receipt of that last half-year's interest; because, looking at the words of the statute, I am of opinion that after one penalty has been incurred upon one bargain or loan, no other offence can be committed in respect of the same bargain or loan, by the lender receiving a further sum by way of usurious interest. The statute 12 *Ann.* st. 2, c. 16, s. 1, enacts, in substance, that all persons who shall upon any contract take, accept, and receive, by way or means of any corrupt bargain or loan, for the forbearing or giving day of payment for one whole year, of and for their money, above the sum of 5*l.* for the forbearing of 100*l.* for a year, and so,

(*a*) 1 East, 195.

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after that rate for a greater or lesser sum, or for a longer or shorter time, shall forfeit and lose for every such offence the treble value of the money lent. The statute, therefore, makes two things necessary to constitute the offence of usury: first, a corrupt bargain or loan; and, secondly, an actual receipt of a higher rate of interest than 5*l.* per cent. for the forbearing or giving day of payment of the money lent. As soon as these two things concur, the offence contemplated by the statute is complete. The party who has received the usurious interest in respect of the corrupt bargain or loan, has then incurred the penalty, and, I think, the *only* penalty attached by the statute to that bargain or loan, and to the receipt of usurious interest upon it, by forfeiting treble the value of the money lent or forborne. If this were not so—if every subsequent payment of legal interest on a loan, where a premium has been given which renders the first payment, though legal in itself, usurious, would constitute a distinct offence of usury—the consequence would be, that if the lender received legal interest on such a loan, at intervals, he would be liable to forfeit treble the value of the money lent, not once only, but every time he received the interest; and if the intervals were short, penalties to the amount of many thousand pounds might be incurred upon the loan of a single hundred pounds. I cannot bring my mind to think that such a result was intended by the legislature: I think their meaning must have been, that no more than treble the value of the money lent should, under any circumstances, be forfeited by the offender in respect of one and the same transaction. In the case of *Scurry* v. *Freeman* (*a*), it does not appear that this point was pressed upon the attention of the Court.

BAYLEY, J.—The offence of usury, as defined by the statute creating it, consists in the receiving more than 5*l.* per cent. interest upon a corrupt bargain or loan. In deciding this case, we must consider the provisions of the

(*a*) 2 Bos. & Pul. 381.

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statute as embodied in the declaration, and then we are to see whether the defendant has received more than 5*l.* per cent. upon his loan, within one year before the commencement of the action. Now, in point of fact, two sums only, of 125*l.* each, were received by the defendant within the year before the action was commenced; and they did not exceed 5*l.* per cent. upon the money lent, provided the debt of 5000*l.* continued. Now, it has been decided, that the taking of usurious interest upon a pre-existing debt, does not destroy that debt, although the party may be liable to penalties (*a*). The 5000*l.*, therefore, continued a debt, and two payments only, not exceeding the legal rate of interest, were made upon it within the year before the commencement of the action. The decision in *Scurry* v. *Freeman* (*b*) may be right, and would undoubtedly be so, if the lender of the money, after the 50*l.* had been retained, had claimed only 450*l.* as the debt.

Rule refused.

(*a*) See the law upon this point stated, and the authorities collected in *Comyn on Usury*, Part iii. chap. 1, sects. 2 & 3, page 183 to 195; *ante*, 582, n., 584.

(*b*) 2 Bos. & Pul. 381.

MOSELEY, Assignee of ROBINSON, a Bankrupt, *v.* HANFORD.

In an action on a promissory note made payable on demand, parol evidence of an agreement entered into when it was made, that it should not be put in suit until a given event happened, is not admissible.

ASSUMPSIT, by the plaintiff, as assignee of a bankrupt, against the defendant as maker of a promissory note for 233*l.*, payable to the bankrupt or his order, on demand. Plea, non assumpsit, and issue thereon. At the trial before *Alexander*, C. B., at the last assizes for the county of Derby, a primâ facie case having been made out, on the part of the plaintiff, by proof of the defendant's handwriting to the promissory note in question, the following evidence was given on the part of the defendant:—The defendant and one *Richardson*, being in partnership as booksellers at Derby, agreed to purchase of the bankrupt certain pre-

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mises belonging to him, and of which he undertook to deliver up possession on the 1st of August, 1825, or to pay for the time he should keep possession beyond that day, a rent agreed upon between the parties. On the 1st of August, 1825, *Richardson* and the defendant paid up the whole of the purchase money, except 233*l.* (the amount of the promissory note,) and the defendant, with the consent of the bankrupt, then gave his sole note for the balance, it being expressly stipulated that it was to be paid only on the bankrupt's delivering up possession of the premises, and accounting for the rent from the 1st of August. The bankrupt did not deliver up possession of the premises, according to his undertaking, and part of them continued in the possession of the bankrupt's sister down to, and since the commencement of the action. The jury found a verdict for the plaintiff.

Denman, C. S., on a former day, moved for a new trial, on the ground that the verdict was against the weight of evidence. [Lord *Tenterden*, C. J. But I have great doubt whether the evidence itself was admissible. Have you any authority to shew that a promissory note like this, absolute on the face of it, can have its effect restrained by parol evidence? *Bayley* J. Is not the case of *Woodbridge* v. *Spooner* (*a*) an authority to shew that such evidence is not admissible? *Parke*, J. The proper distinction I apprehend to be this.—Every bill or note imports two things, value received, and an engagement to pay the

(*a*) 3 Barn. & Ald. 233; 1 Chit. R. 661; where it is said "it is an inflexible rule not to admit parol evidence to contradict a written instrument, unless the consideration be illegal; therefore, where a testatrix gave in her life-time to the plaintiff a promissory note to pay him or order 'on demand, the sum of 100*l.* for value received, and his kindness to me,' with a verbal engagement on the part of the plaintiff that the note should not be demanded till after her death: it was held, in an action upon the note, that parol evidence could not be received to shew that it was not given for a valuable consideration."

amount at a certain specified time; you may give evidence to disprove the receipt of any consideration, but not to vary the engagement.]

The COURT, however, took time to consider of their judgment, which was now delivered by

Lord TENTERDEN, C. J., who, after recapitulating the facts of the case, thus proceeded:—When the application for a new trial was made in this case, it occurred to some of the Court that the evidence given on the part of the defendant ought not to have been received, on the ground that evidence of an agreement, that the note should not be put in suit until a given event happened, was not admissible, the effect of it being to contradict by parol the note itself. And upon consideration we are all of opinion that, upon principle as well as authority, that evidence was not admissible. There are several cases in the books to that effect (*a*).

Rule refused.

(*a*) See *Campbell* v. *Hodgson*, Gow, N. P. C. 74; *Hoare* v. *Graham*, 3 Camp. 57; *Rawson* v. *Walker*, 1 Stark. N. P. C. 361; *Ridout* v. *Bristow*, 1 Tyr. 84, 1 C. & J. 231; *Woodbridge* v. *Spooner*, *suprà*, (*a*).

GARRY *v.* SHARRATT.

The assignee of an insolvent cannot recover from a person with whom the insolvent has deposited the title-deeds of an estate, as a security for a debt, the rents of the estate received by such person subsequently to the assignment.

ASSUMPSIT by the plaintiff, as assignee of *Flowers*, an insolvent debtor, against the defendant, for money had and received by him to the use of *Flowers*. Plea: non assumpsit, and issue thereon. At the trial before *Littledale*, J. at the last assizes for the county of Stafford, the following was the evidence on the part of the plaintiff:—An indenture of assignment of 1 May, 1828, from *Flowers* to *Dance*, provisional assignee of the Insolvent Debtors' Court—a rule of that Court of 13 September, 1828, authorizing *Dance* to assign to the plaintiff—an indenture of

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assignment of 27 April, 1829, from *Dance* to the plaintiff, of all the estate and effects of *Flowers*—that the defendant, after the discharge of *Flowers*, had received 7*l.* 1s. on account of rent of an estate belonging to *Flowers*—and that *Flowers*, prior to his discharge, had always received the rent of the estate himself. On the part of the defendant, the insolvent, *Flowers*, was called, and stated, that in 1826, being indebted to the defendant, he deposited with him the title-deeds of the estate in question, as a security for what he then owed, or might thereafter owe him, and that he had, prior to his discharge, given to the defendant a verbal authority to receive the rent of the estate. The learned judge directed the jury to find for the defendant, if they believed that he had received authority from *Flowers* to receive the rent, and that that authority had not been revoked. The jury said, they considered the deposit of the title-deeds a sufficient authority to receive the rent, and found for the defendant. The plaintiff had leave to move to enter a verdict in his favour for 7*l.* 1s.

Campbell now moved accordingly. First, the defendant never had a legal authority to receive the rents. Secondly, if he once had, that authority was revoked by the assignment to the plaintiff. The deposit of the title-deeds made the defendant equitable mortgagee of the estate; but such a mortgagee has not, necessarily, authority to receive the rents. The legal estate was in the insolvent, as the owner, up to the time of his discharge, and he was entitled to the possession of the land and the perception of the rents. The defendant, as equitable mortgagee, might in a Court of Equity have compelled the conveyance of the legal estate to himself; but he cannot, in a Court of Law, set up his equitable title against one in whom the legal estate is vested. But, assuming that the defendant once had authority from the insolvent to receive the rents, that authority was revoked by the assignment of the insolvent's estate and effects to the plaintiff, and the legal estate then

vested in the plaintiff, who thereby acquired a better title than that of the defendant.

Lord TENTERDEN, C. J.—By the assignment of the insolvent's estate and effects to the plaintiff, all that the insolvent was entitled to at law and in equity passed to the plaintiff, and vested in him as assignee. Now, the insolvent was at law entitled to the land, but the defendant was in equity as mortgagee entitled to the land, and to the rents accruing from it. The assignment to the plaintiff, therefore, could not give him any right to the rents, nor any title to receive them. The verdict, consequently, was right.

The other Judges concurred.

Rule refused.

HUNTER *v.* WRIGHT.

Policy of insurance on a ship for a year, with a stipulation for a proportionate return of premium, "for every uncommenced month if the ship should be sold or laid up." The ship was laid up for several months during the year, but was afterwards employed within the year. Held, that the words "laid up" meant a permanent laying up, such as would put a final end to the policy, and therefore that the assured was not within the stipulation, nor entitled to any return of premium.

ASSUMPSIT, by the *St. Patrick* Assurance Company in Ireland, in the name of their Secretary, to recover the balance of an account alleged to be due to the Company from the defendant, an insurance broker, for premiums on policies on ships effected by the Company. Plea: non assumpsit, and issue thereon. At the trial, before Lord *Tenterden*, C. J., at the London adjourned sittings after last term, it appeared that the policies in question contained a stipulation for the return of a proportionate part of the premiums "for every uncommenced month, if the ship should be *sold or laid up.*" Under this stipulation, the defendant claimed a return of premium for a vessel called the *Lord Stanley*, which had been insured by the Company

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from Lady-day 1826, to Lady-day 1827, and which in the course of that year had been laid up several months for the purpose of repair. It was admitted that if the defendant was entitled to this return, the plaintiff was not entitled to a verdict; but it was contended, that as the vessel was laid up only during part of the year, and was employed during the residue, it was not such a laying up as was contemplated by the policy, and therefore did not entitle the defendant to a return of premium. Lord *Tenterden*, C. J. was of opinion that the words "*laid up*," connected as they were with the word "*sold*," in the policy, meant a laying up of the vessel for the season or winter, without her being employed again during the current year; and his lordship therefore directed the jury to find a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit, in case the Court should be of opinion that such direction was wrong.

Campbell now moved accordingly. Policies of insurance are to be construed liberally. In *Stevenson* v. *Snow* (*a*), Lord *Mansfield*, speaking of them, says, "These contracts are to be taken with great latitude. The strict letter of the contract is not to be so much regarded, as the object and intention of it." (*b*) According to that rule the present defendant seems clearly entitled to the return of premium which he claims. By the stipulation in the policy the assured was at liberty to lay up the ship, and to suspend the policy, and the risk upon it, for any entire month; and the fair effect of that would be, to suspend the payment of premium during the same period. The meaning of the stipulation is, "no risk, no premium," whether for one or more months, or for the whole year. The risk would equally cease, and the payment of premium, therefore, should equally cease, whether the policy were only suspended or entirely put an end to. Unless this be so, the

(*a*) 3 Burr. 1237; 1 W. Bl. 315. (*b*) 3 Burr. 1240.

stipulation becomes useless, for it cannot be supposed that a party would insure his vessel for a whole year with the intention of laying her up for the whole year.

Lord TENTERDEN, C. J.—I am of opinion now, as I was at the time of the trial, that the words "*laid up*" being in company with the word "*sold*," must mean a permanent laying up, similar to that which would take place if the ship were sold—in other words, such a laying up as would put a final end to the policy. I therefore think we ought not to grant any rule.

BAYLEY, J. and LITTLEDALE, J. concurred.

PARKE, J.—I am of the same opinion. The meaning of the parties may certainly have been, to stipulate in the manner in which it is contended for the defendant that they did stipulate, but they have not expressed themselves in words capable to convey that meaning. The only true construction of the words "*laid up*," as used in this stipulation, is such a laying up as must put an end to the policy altogether.

Rule refused.

GAUSSEN and others *v.* W. MORTON and E. MORTON.

A power of attorney given by a debtor to a creditor, authorizing him to sell an estate, and to apply the proceeds in liquidation of his debt, is an authority coupled with an interest, and cannot be revoked.

TRESPASS for breaking and entering two closes of the plaintiffs, situate in the county of Hertford. Pleas: first, not guilty; second, that the closes in which &c., were parcel of the manor of Park, in the county of Hertford, and customary tenements of that manor, demised and demisable by copy of court-roll by the lord of that manor, or his steward for the time being, to any person or persons willing to

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take the same in fee-simple or otherwise, at the will of the lord, according to the custom of the manor; that before the said time when &c., to wit, on &c., the Earl of *Essex*, then being lord of the said manor, at his court then holden in and for the manor, before *A. B.*, then his steward of the court of the said manor, by copy of the court-rolls of the said manor, granted to one *J. L.* the said closes in which &c., in fee, at the will of the lord, according to the custom of the said manor; that by virtue of such grant, the said *J. L.* afterwards and before the said time when &c., to wit, on &c., entered into the said closes in which &c., and became and was seised in fee thereof &c., and died so seised; that thereupon the same descended to one *M. L.*, as eldest daughter and heiress of the said *J. L.*, who thereby became and was seised in fee of the said closes in which &c., and being so seised, intermarried with *W. Morton*, (one of the defendants,) and thereby the said *W. M.* and *M.* his wife, in right of the said *M.*, became and were seised in fee of the said closes in which &c.; and that therefore the said *W. M.* in his own right, and *E. Morton*, (the other defendant,) as his servant, and by his command, broke and entered the said closes in which &c. Replication: that *J. L.* at the time of his death was not seised of and in the said closes in which &c., in manner and form as alleged by the defendants. Issue thereon. At the trial, before *Tindal*, C. J., at the last assizes for the county of Hertford, it appeared that the question whether *J. L.* had died seised in fee or not of the premises in question, depended upon the legality of a power of attorney which he had executed, authorizing the surrender of the estate, and upon the question whether such power of attorney had or had not been legally revoked. The facts proved in evidence upon that subject were as follows:—In 1787, *J. L.* became bound to *W. F.* & Co. for a debt of 230*l.*, due to them from his son. The money not having been paid according to the condition of the bond, *J. L.*, in order to discharge the debt, being seised in fee of the customary premises in question, executed a warrant of attorney

on the 3d of December, 1787, authorizing *W. F.* to appear for him at the then next or any subsequent court baron or customary court, holden in and for the manor of Park, and surrender the premises to the use of such person or persons as might become purchasers thereof; and he further authorized *W. F.* to sell the premises and receive the purchase-money. Under this power *W. F.*, on the 7th of February, 1788, sold the premises by auction for 105*l.*, and received 20*l.* from the purchaser as a deposit. On the 12th of April, 1788, *J. L.* contending that *W. F.* had violated some of the stipulations in the agreement between them, executed a deed-poll, revoking the power given to *W. F.*, and gave notice thereof to the steward of the manor. In May, 1788, *W. F.* applied to the steward to take his surrender of the premises to the use of the purchaser. This the steward at first refused to do, on account of the revocation of the power; but afterwards, on receiving an indemnity, he took the surrender and admitted the purchaser, from whom title was deduced to the plaintiffs. The plaintiffs being in possession, the defendants entered and took away some hay. Upon this evidence it was contended, on the part of the defendants, that as *J. L.* had revoked the power of attorney before the surrender was made, he had died seised of the premises as alleged in the plea. That point the Lord Chief Justice reserved, and the plaintiffs had a verdict, with leave to the defendants to move to enter a nonsuit.

Brodrick, on a former day, moved accordingly. The authority given by the power of attorney had not been executed at the time when the alleged revocation took place; this case therefore comes within the principle of the rule laid down by *Houghton*, J. in *Webb* v. *Paternoster* (*a*), that a licence, when executed, is not countermandable, but it is otherwise while it remains executory. [*Parke*, J. But in *Walsh* v. *Whitcomb* (*b*), Lord *Kenyon* held, that a power of attorney, given as part of a security for money, was not

(*a*) Popham, 151. (*b*) 2 Esp. 565.

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countermandable; and in *Watson* v. *King* (*a*), Lord *Ellenborough* expressed a similar opinion.] That certainly is so; but in *Walsh* v. *Whitcomb* (*b*) the power had been executed before the countermand; and in *Watson* v. *King* it became unnecessary to decide this point, because the person giving the authority died before it was executed.

The Court took time to consider of their judgment, which was now delivered, after adverting to the pleadings, by

Lord TENTERDEN, C. J.—The question, whether *J. L.* died seised of the premises in which the trespass was alleged to have been committed, depended upon this; whether he could revoke the power of attorney which he had given to *W. F.* Upon consideration, we think that that power of attorney was not a simple authority to sell and surrender the premises, but an authority coupled with an interest, for *W. F.* was to apply the proceeds of the sale in liquidation of a debt due to himself and his partner; and there are several cases in which it has been held that such an authority cannot be revoked.

Rule refused.

(*a*) 1 Stark. 121; 4 Campb. 272. (*b*) 2 Esp. 565.

DOE on the demise of BENJAMIN JONES *v.* MICHAEL JONES.

The duly elected minister of a dissenting congregation, who is put in possession of a chapel and dwelling-house by trustees, in whom they are legally vested, in trust to permit the chapel to be used for the purpose of religious worship, is mere tenant at will to such trustees, and his tenancy is determined by a demand of possession, without any previous notice to quit.

EJECTMENT, to recover the possession of a chapel and dwelling-house situate in the county of Merioneth. Plea: not guilty, and issue thereon. At the trial before *Raine*, C. J. at the last great sessions for the county of Merioneth, the case was this:—By lease and release of 4th and 5th August, 1783, a piece of land, therein particu-

larly described, and the structure or meeting-house thereon erected and built, were conveyed unto *Benjamin Jones*, and nine other persons therein named, and to their heirs and assigns, to have and to hold the same, with their and every of their appurtenances, unto the said *Benjamin Jones* and the nine other persons therein mentioned, and their successors, ministers of the respective meeting-houses or places therein mentioned, for the time being, for ever, in trust, and to the intent and purpose that the said structure or building should be used as a meeting-place or house for public and religious worship, by the society or congregation of protestant dissenters, called Presbyterians; and that they should permit and suffer the same from time to time to be used, occupied and enjoyed, as and for a meeting-house, place, or house for such public and religious worship, by such society or congregation of protestant dissenters, and for no other use, intent, or purpose whatsoever. The defendant had, sixteen years ago, been elected by the congregation, according to the usual practice, minister of the chapel, and was then put into possession of the house and premises by officers acting under the authority of the trustees. At a meeting of the congregation in the year 1828, it was determined that the minister should be changed; but no other minister was elected. Possession of the chapel, dwelling-house, and premises was afterwards demanded of the defendant, but he refused to quit. The lessor of the plaintiff was the grandson and heir at law of another *Benjamin Jones*, who had been the last surviving trustee of those named in the deed. Upon this evidence it was contended on behalf of the defendant, that he could not be considered as a trespasser, and consequently that the lessor of the plaintiff could not recover possession of the premises against him, so long as he continued minister of the chapel—that by the very deed under which the lessor of the plaintiff claimed, the trustees held the chapel in trust to permit and suffer it to be used as a place of religious worship—and that the defendant, having been duly elected

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to fill the office of minister of the chapel, had an office coupled with an interest, and must continue to hold that office until another minister should be duly elected, according to the usual course adopted on former occasions. The learned Chief Justice, however, was of opinion that the legal estate was in the lessor of the plaintiff, as heir at law of the last surviving trustee named in the deed; and he directed the jury to find a verdict for the plaintiff, reserving to the defendant leave to move to enter a nonsuit.

Campbell now moved accordingly. The defendant having been duly elected minister of the chapel, continues so until another has been regularly appointed by the congregation; and while he continues minister, the trustees cannot treat him as a trespasser, and maintain ejectment against him. The proper course would have been for the congregation to have elected another minister; and then the Court, by mandamus, would have compelled the defendant to give him possession of the chapel and other premises. So long as the defendant continues in his office of minister, he has a possessory right to the house. In *Rex* v. *Baker* (*a*), Lord *Mansfield*, speaking of a case very similar to the present, says, "The deed is the foundation or endowment of the pastorship. The form of the instrument is necessarily by way of trust: for the meeting-house, and the land upon which it stands, could not be limited to *Enty* (*b*) and his successors. Many lectureships and other offices are endowed by trust-deeds. The right to the function is the substance, and draws after it every thing as appurtenant thereto. The power of the trustees is merely in the nature of an authority to admit. The use of the meeting-house and pulpit, in this case, follows, by necessary consequence, the right to the function of minister, preacher, or pastor, as much as the insignia do the office of a mayor; or the custody of the books that of a town-

(*a*) 3 Burr. 1266.

(*b*) One of the trustees named in the deed, and the minister thereby originally appointed.

clerk." And *Foster*, J. added, "Here is a legal right. Their ministers are tolerated and allowed. Their right is established, therefore, as a legal right, and as much as any other legal right." [*Parke*, J. The result of that case was merely this—that the Court granted a mandamus to admit the party elected to the use of the *pulpit* as minister, preacher, or pastor. That is perfectly consistent with the legal estate in the chapel being in the trustees. The use of the pulpit is no more than an easement; it is like a right of common, or a right of way. In this case the defendant had no other estate in the premises than that of tenant at will, which has been put an end to by the demand of possession. The right to the chapel is clearly in the trustees. The defendant may possibly have a remedy against them in equity, if they have improperly turned him out, but at law he has clearly no title to set up as against their's.]

Lord TENTERDEN, C. J.—The right to the use of the pulpit, or to the pastorship, by no means leads to the conclusion that there is any legal right to the chapel, or to the dwelling-house. The building, in cases like this, is generally vested in persons other than the pastor. For the reasons given by my brother *Parke*, I think it perfectly clear that the legal estate in the premises was in the lessor of the plaintiff.

BAYLEY, J.—I am entirely of the same opinion. We do not decide that the defendant may not have a right to the use of the pulpit, but merely that he has no legal estate in the buildings. The highest estate at law which he ever had in them, was an estate at will, and that has been determined by the demand of possession. If he is aggrieved by the proceedings of the trustees, he must seek his remedy against them in equity.

Rule refused.

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DOE on the demise of NICHOLL and others *v.* M'KAEG.

The minister of a dissenting congregation, who is put in possession of a chapel and dwelling-house by trustees, in whom they are legally vested in trust to permit the chapel to be used for the purpose of religious worship, is mere tenant at will to such trustees, and his tenancy is determined *instanter* by a demand of possession, without *any* previous notice to quit.

EJECTMENT, to recover the possession of a chapel and dwelling-house, situate in the county of York. Plea: not guilty, and issue thereon. At the trial, before *Park*, J. at the last Yorkshire assizes, the case was this:—The defendant was the minister of a dissenting congregation, and, as such, in possession of the premises sought to be recovered. They consisted of a meeting-house and dwelling-house adjoining, both which had been conveyed to the lessors of the plaintiff as trustees for the congregation. The defendant had been elected minister by the members of the congregation, and had been put in possession of the premises by the trustees. The congregation becoming dissatisfied with the defendant, came to a resolution to remove him, and the trustees made a demand of possession, which not being immediately complied with, they served a declaration in ejectment. The defendant had an annual salary of 20*l.* as minister, but paid no rent. No notice to quit had been given. It was objected on behalf of the defendant that he was a tenant of some sort, and entitled to some notice to quit, and a nonsuit was pressed for on that ground. The learned judge declined to nonsuit, but reserved the point, and a verdict was found for the plaintiff, with liberty for the defendant to move to enter a nonsuit.

F. Pollock, on a former day, moved accordingly. The defendant was entitled to some notice, and as no notice at all was given, but the declaration in ejectment was served immediately after the demand of possession was made, the plaintiff ought to have been nonsuited. The defendant was not, strictly speaking, a tenant at will—he was not like a servant occupying by permission a part of his master's house—he had the exclusive occupation of the house—he occupied the house as part of his reward for doing the duties of minister to the chapel. He was, therefore, a

tenant of some sort, and was entitled to some sort of notice. If he had been paid entirely by a salary, and had rented the house of the trustees, it is clear that he would have been a tenant entitled to a regular notice to quit. In effect he stood in the same situation—the only difference was, that instead of paying rent in money, he paid rent by his services. But, admitting that he was not entitled to a regular notice to quit, he was surely entitled to some reasonable notice, and was not liable to be turned out of possession at a moment's warning, and driven with his family and furniture into the street, upon peril of being treated as a trespasser. In all cases of a continuing contract, some reasonable notice must be given of putting an end to it. What is such reasonable notice, it must be for the Court or the jury to decide; but it seems most unreasonable that the exclusive occupation of a dwelling-house by a minister, as a part of the reward for his services, should be determined without some notice, and here there was none.

The Court took time to consider of their judgment, which was now delivered by

Lord TENTERDEN, C. J.—This was an ejectment brought to recover from the defendant, who was minister of a dissenting congregation, a chapel and dwelling-house, which he was put into possession of by the lessors of the plaintiff, in whom the legal estate was vested, in trust to permit the chapel to be used for the purpose of public worship. The defendant was tenant at will to them. It was contended that a demand of possession was not sufficient to determine the tenancy in this case, but that a reasonable time ought to have been allowed to the defendant for the purpose of removing his goods. We can find no authority in the law for such a position. The general rule is, that where an estate is held at the will of another, a demand of possession by that other determines the estate. If we were to hold otherwise in this case, we should be

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introducing a new rule, not to be found in the books, and which might be productive of great inconvenience; because then, in every case of a tenancy at will, a question might arise, what was a reasonable time to be allowed for the removal of the tenant's goods. If the tenant in this case, after the determination of his tenancy by the demand of possession, had entered on the premises for the sole purpose of removing his goods, and continued there no longer than was necessary for that purpose, and without excluding the landlord, perhaps he might not have been a trespasser; but, however that may be, we are of opinion, that he being a tenant at will, his tenancy was determined by a demand of possession, and consequently, that the lessors of the plaintiff were entitled to recover.

Rule refused.

WOOD and another v. GRIMWOOD.

The 6 *Geo.* 4, c. 50, s. 30, applies only to cases where a verdict is actually found: therefore a defendant, who has moved for and obtained a special jury, is not entitled, under that section, to the costs of such jury, where the plaintiff either withdraws the record or is nonsuited; although the judge has certified that the cause was proper to be tried by a special jury.

But see 3 & 4 *Will.* 4, c. 42, s. 35.

THIS was a question of costs. The cause was first set down for trial at the Essex summer assizes, 1829, when the plaintiffs withdrew the record. At the spring assizes, 1830, the cause was again set down for trial, when the plaintiffs were nonsuited. On both occasions a special jury was moved for and nominated on the part of the defendant; and on the second occasion the learned judge certified that the cause was a proper one to be tried by a special jury. On taxation, the Master allowed the defendant the costs of both special juries. On a former day

Follett obtained a rule for the Master to review his taxation, and to disallow to the defendant the costs of both special juries. As to the first jury, he contended that the record having been withdrawn before they were sworn, and they having been afterwards unnecessarily paid by the

plaintiffs, the Master was not justified in visiting the defendant with that expense. Secondly, as to both juries, he contended that the judge had no power to certify, the cause never having been tried. By the 24 *Geo.* 2, c. 18, s. 1, it was enacted, "that the party applying for the special jury shall pay the costs and expenses thereof, unless the judge before whom the cause is *tried* shall, immediately after the *trial*, certify in open court, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury." Upon that statute it had been held, first, that it did not extend to a case where the record was withdrawn; *Clements* v. *George* (*a*); and, secondly, that it so far limited the discretionary power of the judge, that he could not grant a certificate on the day after the trial; *Waggett* v. *Shaw* (*b*). As to the nonsuit, in *Orme* v. *Crockford* (*c*), where the plaintiff was nonsuited without any evidence being gone into, Lord *Tenterden* had refused to certify, on the ground that the case had not been gone into. Then the more modern statute of 6 *Geo.* 4, c. 50, s. 30, contained a provision precisely similar to that in 20 *Geo.* 2, c. 18, s. 1, except that it substituted the word "*verdict*" for the word "*trial*," which made the present argument still stronger; for even if it could be said that there was a *trial* in this case, it could not at all events be contended that there was a *verdict*.

Brodrick now shewed cause. The cause was, in effect, tried. The plaintiffs, through their counsel, had stated to the jury all the facts which they were capable of proving, and the learned judge, being of opinion that if all the facts stated were proved upon oath, and were unanswered, the plaintiffs would not be entitled to a verdict, nonsuited the plaintiffs, and immediately afterwards certified that the cause was a proper cause to be tried by a special jury. It is true that the statute 6 *Geo.* 4, c. 50, s. 30, does substitute

(*a*) 11 Moore, 510.
(*b*) 3 Campb. 316.
(*c*) 1 Car. & P. 537.

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the word *verdict* for that of *trial* in the former statute; but that is immaterial, for though the term is changed, the meaning of the proviso and the intention of the legislature continue manifestly the same.

Follett, contrà, was stopped by the Court.

Lord TENTERDEN, C. J.—We must construe the term "verdict," in the present act of parliament, in its ordinary sense. Here, there was no verdict, and, consequently, the learned judge had no power by his certificate to charge the plaintiffs with the costs of a special jury, which was moved for by the defendant. The rule, therefore, must be made absolute.

BAYLEY, J.—I am of the same opinion. The term "verdict" must be construed in its ordinary sense. Here there was no verdict.

PARKE, J.—I am also of the same opinion. We cannot presume that the legislature have, in the present instance, used the term *verdict* without some meaning; and it seems to me their meaning must have been, to give the judge a discretionary power of allowing the costs of a special jury to the party at whose instance it was obtained, in those cases only where the jury have been called upon to exercise their judgment by returning a verdict. They may have intended otherwise; but we can only collect their intention from the words they have used, construed in their ordinary sense. The statute 49 *Geo.* 3, c. 121, s. 10, has received a similar construction. That enacts, that in actions by assignees of bankrupts, the commission and proceedings shall be evidence of the trading, &c., unless notice shall have been given to dispute; and that where such notice shall have been given, the judge may grant a certificate that the matter disputed was proved, and the assignees shall be entitled to the costs occasioned by such notice, and such

costs shall, in case the assignee shall obtain a *verdict*, be added to his costs; and if the defendant shall obtain a *verdict*, shall be set off or deducted from the costs which such defendant would otherwise be entitled to receive from such assignee. It was held that assignees were not entitled to costs upon a judge's certificate, under this section, where they had been nonsuited; *Atkins* v. *Seward* (*a*).

Rule absolute (*b*).

(*a*) 3 Moore, 601; 1 Bro. & Bing. 275.

(*b*) Since the decision of this case it has been enacted, by 3 & 4 *Will.* 4, c. 42, s. 35, that the provision of the 6 *Geo.* 4, c. 50, s. 30, and every thing therein contained, shall apply to cases in which the plaintiff shall be nonsuited, as well as to cases in which a verdict shall pass against him.

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ASSUMPSIT. The second count of the declaration (upon which the case turned) stated, that before and at the time of the making of the promises and undertakings therein mentioned, one *Thomas Thomas* was tenant to the plaintiff of a certain farm with the appurtenances, and was indebted to the plaintiff in the sum of 17*l.* 10*s.* for rent in respect of such farm; that thereupon, in consideration that the plaintiff would forbear from distraining the goods upon the farm, for the rent so due from *Thomas Thomas*, the defendant promised the plaintiff to pay to him the rent that would be due *at the Michaelmas then next following* from

Plaintiff's tenant being in arrear for half a year's rent due at Lady-day, defendant, an auctioneer, was in August about to sell the effects on the premises, when plaintiff attended and threatened to distrain. Defendant, in consideration that plaintiff would not distrain, verbally promised to pay him the rent then due, and the rent which would become due at Michaelmas. In an action to recover both amounts of rent:—Held, that plaintiff could recover neither; for that the promise to pay the accruing rent was founded on a new consideration, distinct from the demand which plaintiff had on his tenant, and was therefore void under the fourth section of the statute of frauds; and that such promise being entire, and void in part, was void altogether.

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Thomas Thomas to the plaintiff in respect of the farm. Averment, that the plaintiff did forbear from distraining; that the rent due *at the Michaelmas then next following* was 38*l.*, and breach for non-payment of that sum. Plea: non assumpsit, and issue thereon. At the trial, before *Goulburn*, J. at the spring great sessions for Carmarthen, 1829, the case was this:—*Thomas Thomas* was tenant to the plaintiff of a farm in the parish of Llangudock, in the county of Carmarthen, at a yearly rent of 40*l.*, payable half-yearly, at Lady-day and Michaelmas. The defendant was an auctioneer, and in August, 1827, was employed to sell off *Thomas Thomas's* effects upon the farm. The plaintiff went to the farm on the day of the sale, with a bailiff and a notice of distress for 17*l.*, being part of a half-year's rent due on the Lady-day preceding, the rest having been paid, and told the defendant that there would be nearly a year's rent due to him at Michaelmas, and that unless he, the defendant, promised to pay him the rent that would then become due, he, the plaintiff, would put in the distress. The defendant thereupon did verbally promise that if the plaintiff would not distrain for the rent then due, he, the defendant, would pay him the rent that would be due at Michaelmas. The plaintiff did not distrain, and the sale proceeded. It was objected on the part of the defendant, that the promise not being in writing, the case was within the fourth section of the statute of frauds, 29 *Car.* 2, c. 3, and the defendant was entitled to a general verdict. The learned judge directed a verdict to be entered for the plaintiff on the second count for 22*l.* 10*s.*, a sum composed partly of rent due at the Lady-day preceding the promise, and partly of the rent which became due at the following Michaelmas, and for the defendant on the other counts; but gave the defendant's counsel leave to move to enter a verdict for him on the second count also, in case the Court should be of opinion that the promise ought to have been in writing. In Easter term, 1829,

John Evans moved accordingly, and obtained a rule to shew cause why a general verdict should not be entered for the defendant; and at the sittings in banc after Hilary term, 1830,

Russell, Serjt. and *E. V. Williams*, shewed cause. The cases of *Lexington* v. *Clarke* (*a*), and *Chater* v. *Beckett* (*b*), will be relied upon for the defendant as authorities to shew that where part of a promise is within the fourth section of the statute of frauds, and is thereby required to be in writing, the whole is void if the promise is merely verbal. Even if those cases can be considered as having established that position, it will not apply to the present case, because no part of the promise upon which the plaintiff founds his claim is within the fourth section of the statute. The plaintiff had an unquestionable right to distrain upon his tenant for the rent due at Lady-day. That right he intended and was prepared to exercise, and he forebore to do so in consideration of the defendant undertaking to pay, not only the rent then due, but also the rent which would become due at the following Michaelmas. The defendant, on his part, gave that undertaking in consideration of the plaintiff abandoning his right to distrain; there was, therefore, a new consideration moving from the plaintiff to the defendant, totally distinct from any contract between the plaintiff and his tenant. It follows, that the defendant's undertaking is original and not collateral, and is not affected by the statute, which was meant to apply to such only as are collateral. The case of *Williams* v. *Leper* (*c*), is in principle this very case. There the defendant had promised to pay the debt of the tenant, in consideration of the plaintiff forbearing to distrain, and allowing the defendant to have the goods which were liable to the distress; and it was held that as there was a new consideration for the defendant's promise moving to him, the statute did not

(*a*) 2 Vent. 223.
(*b*) 7 T. R. 201.
(*c*) 3 Burr. 1886; 2 Wils. 308.

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apply. The principle there laid down is in conformity with the decisions and the opinions expressed by the judges in several other cases; as *Read* v. *Nash* (*a*), *Castling* v. *Aubert* (*b*), *Edwards* v. *Kelly* (*c*), *Bampton* v. *Paulin* (*d*), *Houlditch* v. *Milne* (*e*), and *Tomlinson* v. *Gill* (*f*). [*Bayley*, J. But in this case the promise extends far beyond that in *Williams* v. *Leper* (*g*), and there *Aston*, J. was of opinion that the defendant was not liable beyond the value of the goods.] That is certainly so; but there is no authority which lays it down that the consideration and the promise must be co-extensive, in order to support the action.

Campbell and *John Evans*, contrà. In order to render any promise to pay the debt of another binding under the fourth section of the statute of frauds, there must be a new consideration moving to the party making the promise; a consideration merely moving from the creditor is not sufficient. Nor is the fact of the original debtor continuing indebted, sufficient; for that is in truth no consideration at all. *Williams* v. *Leper* and all the other cases which have been cited for the defendant, are perfectly distinguishable from the present. In each of those cases the defendant received from the plaintiff, or was permitted by him to receive aliundè, certain property on which the plaintiff had a lien, which the defendant promised to discharge upon having the property delivered to him. This is the view taken of that case by *Le Blanc*, J. in *Castling* v. *Aubert*, where he says, "This is a case where one man having a fund in his hands, which was adequate to the discharge of certain incumbrances, another party undertook that if that fund were delivered up to him, he would take it with the incumbrances; this, therefore, has no relation

(*a*) 1 Wils. 305.
(*b*) 2 East, 325.
(*c*) 6 M. & S. 204.
(*d*) 4 Bingh. 264.
(*e*) 3 Esp. 86.
(*f*) Ambler, 330.
(*g*) 3 Burr. 1886; 2 Wils. 308.

to the statute of frauds." Here, the plaintiff had no lien whatever on the property delivered to the defendant, for the rent which was to become due at a future time. It is this circumstance which so broadly distinguishes the present case from all the authorities cited on the other side. As to that portion of the rent, therefore, the promise was within both the letter and the mischief of the statute, and was unsupported by any consideration: and if the part of the promise relating to the rent which would become due at Michaelmas, was within the statute and void, the cases of *Lexington* v. *Clarke* (*a*), and *Chater* v. *Beckett* (*b*), are decisive to shew that the plaintiff cannot separate the two parts of the contract, and that the whole is void together.

The Court took time to consider of their judgment, which was now delivered by

Lord TENTERDEN, C. J.—We are of opinion that this action is not maintainable. The facts of the case were shortly these:—One *Thomas Thomas* was tenant to the plaintiff of certain premises, and indebted to him in a sum of about 17*l.* for rent due at Lady-day. In August the defendant, who was an auctioneer, was about to sell the goods of the tenant upon the premises. The plaintiff went to the premises, and was about to distrain for his rent. The defendant then promised that if the plaintiff would not distrain, but would suffer the sale to proceed, he would pay him the arrears of rent then due, and also the accruing rent up to Michaelmas then next. The plaintiff did not distrain, and the sale proceeded. The defendant's promise was by word only, without any writing. Some money had been paid, but not quite so much as the amount of the arrears due at Lady-day. At the trial the plaintiff had a verdict for the whole difference between the amount of the money paid, and the amount of the rent up to Michaelmas, including the arrears of the rent due at Lady-day. The question was, whether the plaintiff could

(*a*) 2 Vent. 223. (*b*) 7 T. R. 201.

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recover the whole of that sum, or the difference between the money paid and the arrears due at Lady-day, or whether the whole contract was void, within the fourth section of the statute of frauds—and we are of opinion, that the whole contract was void. Several cases were quoted at the bar in support of the plaintiff's claim; but there is no case in which the promise to pay has gone beyond the amount of the right vested in the party to whom the promise was made, or beyond the assumed value of the fund out of which the payment was to be made. In *Edwards* v. *Kelly* (*a*), the landlord to whom the promise was made had actually distrained the goods of his tenant, and delivered them to the defendant to be sold in consideration of his promise to pay the rent due for which the distress had been made. In *Castling* v. *Aubert* (*b*), the plaintiff gave up to the defendant policies of insurance, on which the plaintiff had a lien, to secure himself against bills which he, on the faith of that lien, had accepted for the accommodation of the assured, and the person to whom he delivered them promised to discharge the bills and give to the plaintiff the same indemnity that his lien had afforded him. In those cases, the promise was founded on a new consideration distinct from the demand that the plaintiff had against the third person, although its performance would have the effect of discharging that demand, and releasing that person. In *Williams* v. *Leper* (*c*), there was no actual distress, but there was a power of immediate distress, and an intention to enforce it; and we think the judges must be understood to have considered that power equivalent to an actual distress (*d*). It is not necessary now to decide whe-

(*a*) 6 M. & S. 204.

(*b*) 2 East, 325.

(*c*) 3 Burr. 1886; 2 Wils. 308.

(*d*) It seems clear that three of the judges did so consider. Lord *Mansfield* said, "The landlord had a legal pledge. He enters to distrain. He has the pledge in his possession. The plaintiff had a lien upon the goods. *Leper* was a trustee for all the creditors; and was obliged to pay the landlord, who had the prior lien." *Wilmot*, J. said, "The plaintiff is in possession of the goods; having entered with intent to distrain

ther it was rightly so considered, because supposing it to have been rightly so considered, the decision will not go beyond the amount of the arrears then due, and for which the right of distress might have been immediately exercised (*a*).

But this reasoning will not apply to the accruing and future rent. The plaintiff could not have distrained for that rent. The defendant, by paying all that was due at Lady-day, might have proceeded to sell the goods. If that sum were paid or secured, the plaintiff sustained no loss or detriment by the sale of the goods. So that the promise to pay the accruing rent exceeded the consideration, and cannot be sustained on the ground on which the cases referred to are to be sustained, but is nothing more than a promise to pay money that would become due from a third person, and is within the words of the statute, and the mischief intended to be remedied thereby.

The next question then, is, whether the promise, being void in part, can be held good as to the other part, namely, the arrears of rent due at Lady-day, in respect of which it might have been good, if confined to those arrears. Upon this point the two cases of *Lexington* v. *Clarke* (*b*), and *Chater* v. *Beckett* (*c*), which were quoted at the bar, are direct authorities against the plaintiff. In each of those cases the promise was held, as to a part, to be within the statute, and as to a part to be not within the statute; and the action proceeded upon the part not within the statute, the other part having been satisfied. But it was

them. I consider this distress as being actually made. *Leper* became the bailiff of the landlord; and when he had sold the goods, the money was the landlord's, in his own bailiff's hands." And *Yates*, J. said, "The defendant was in possession of the goods, and about to sell them. The plaintiff entered with intent to distrain them for 45*l*. The defendant says, 'let me go on to sell them and I will pay you the 45*l*.' He undertook to pay this, in all respects, peremptorily and absolutely. This is an original consideration in the defendant." 3 Burr. 1889, 1890.

(*a*) See *Bayley*, J. on this point, citing *Aston*, J., *ante*, p. 628.

(*b*) 2 Vent. 223.

(*c*) 7 T. R. 201.

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held that the promises were entire, and that, being in their commencement void in part, they were void altogether. For these reasons, and upon these authorities, we are of opinion that the plaintiff in this case can recover nothing. The rule for entering a general verdict for the defendant must, therefore, be made absolute.

Rule absolute.

OBBARD and Another, Assignees of BLOFIELD, a Bankrupt, *v.* BETHAM.

A partial failure of consideration cannot be given in evidence in answer to an action by the drawer, or his legal representative, against the acceptor of a bill of exchange.

ASSUMPSIT on a bill of exchange, drawn by the bankrupt and accepted by the defendant. Plea non assumpsit, and issue thereon. At the trial before Lord *Tenterden*, C. J., at the adjourned Middlesex sittings after Michaelmas term 1829, the case was this:—In the year 1825 the bankrupt, a perfumer and cutler in *London*, furnished to the defendant, the captain of an East Indiaman, a quantity of perfumery and cutlery goods to carry out to India. They were delivered ready packed, and the defendant had no opportunity of inspecting them until he arrived at the end of his voyage. The price charged for the goods was 400*l.*, of which the defendant paid 250*l.* in cash, and for the remainder the bankrupt drew upon him the bill in question, which was dishonoured when due. It appeared by a written contract entered into by the parties, that the goods were to be charged at a fair marketable price, and were to be of a good merchantable quality, and it was proposed to prove in defence to the action that they were of a very inferior quality, not merchantable, and that they sold for 150*l.* less than the price charged for them by the bankrupt, so that he had in fact been already fully paid. It was objected for the plaintiffs, that such evidence could not be received, inasmuch as it would constitute no defence, because a partial failure of consideration was no answer to an action upon a bill

of exchange: and *Tye* v. *Gwynne* (*a*) was cited. The Lord Chief Justice, being of opinion that the objection was well founded, rejected the evidence, and the plaintiffs had a verdict for the full amount of the bill. In Hilary term 1830,

Scarlett, A. G. moved for a new trial, upon the ground that the evidence had been improperly rejected. This being in effect an action by the drawer of the bill against the acceptor, and they being the same parties between whom the original contract was made, any defence which would have been available in an action founded directly on the contract, seems equally available in an action on the bill, which is indirectly founded on the contract. The mere act of giving a bill of exchange for a part of the price of the goods, cannot vary the situation of the parties, or affect their respective rights. It was therefore competent to the defendant to prove, in answer to this action, that the bankrupt had been fully paid. The decision in *Tye* v. *Gwynne* must be taken with this qualification, namely, "unless the failure of consideration arises from fraud in the first instance," *Fleming* v. *Simpson* (*b*); and it seems not too much to say that a delivery of goods under this contract, which realised little more than half the price charged for them, must have been fraudulent in the first instance. In that view of the case the evidence was clearly admissible, *Solomon* v. *Turner* (*c*), where it was held, that though a defendant, who had given his note for the stipulated price of a picture, could not give in evidence the inadequacy of the consideration, with a view to diminish the damages, he might do so for the purpose of shewing fraud, to defeat the

(*a*) 2 Campb. 346, where it was held, by Lord *Ellenborough*, that "it is no defence to an action by the drawer and payee of a bill of exchange against the acceptor, that the consideration has partially failed on account of the badness of the quality, and improper package, of the goods delivered." And see, *S. P.*, *Morgan* v. *Richardson*, 1 Campb. 40, n.; 7 East, 482; 8 Smith, 487.

(*b*) 1 Campb. 40, n.

(*c*) 1 Starkie, 51.

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contract altogether. In *Lewis* v. *Cosgrave* (*a*), in an action on a bill given for the price of goods sold under a warranty, it was held, that proof of a breach of the warranty was an answer to the plaintiff's demand, the defendant having tendered back the goods, though the plaintiff refused to receive them. Here the goods were sold under a warranty, and a breach of that warranty could have been proved; and the fact of the goods not having been tendered back is not material, because the situation of the defendant rendered his doing so impossible, he having had no opportunity to inspect the goods until he arrived in India, and being there obliged to sell them for the best price he could obtain.

Cur. adv. vult.

Judgment was now delivered by

Lord TENTERDEN, C. J.—We have considered this case, and are of opinion that we ought not to grant a rule for a new trial. The case of *Tye* v. *Gwynne* (*b*), which was cited at the trial, and other cases, which are all collected in my brother *Bayley*'s work upon Bills, the fourth edition, pages 395 and 396, are authorities to shew, that though a total want of consideration may be given in evidence in answer to an action upon a bill of exchange, a partial failure of consideration only cannot. The decision at nisi prius, therefore, was right.

Rule refused (*c*).

(*a*) 2 Taunt. 2.

(*b*) 2 Campb. 346.

(*c*) And see *Day* v. *Nix*, 9 Moore, 159; *Archer* v. *Bamford*, 3 Stark. 175; 1 Car. & P. 64.

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The KING *v.* The Inhabitants of CHEW MAGNA.

A gift of land by parol confers only an estate at will; and an undisturbed possession for fifteen years confers no settlement.

Residence, by a tenant at will, upon an estate of less value than 10*l.* a year, confers no settlement.

BY an order of two justices, *James Naish* and *Joanna* his wife were removed from the parish of Ubley to the parish of Chew Magna, both in the county of Somerset. On appeal, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

William Bath, about 1795, being seised in fee of a close of land in the parish of Ubley, gave a small piece thereof *by parol* to his nephew *James Naish*, the pauper, whereon to build a cottage. *Naish*, who had no settlement in Ubley, took possession of the spot, and built his cottage, and inhabited it with his family. In October, 1800, while he so resided in Ubley, his wife and children became ill, and he applied to the overseers of that parish for relief, and obtained the same; and on their complaint, an order for the removal of *Naish*, his wife, and their children, to the parish of Chew Magna, was made by two justices, and *Naish* was, under that order, removed and delivered to the overseers of Chew Magna, who relieved *Naish* from time to time. *Naish* slept in that parish one night only, and the next day returned to the cottage in Ubley, from whence neither his wife nor children, on account of their illness, had been removed. *Naish* continued to reside there till about 1810, when *Bath* told him that he had sold the ground to one *Carpenter*, and asked *Naish* to give him free possession, and to sell him his right. *Naish* was unwilling to do so, but before he said any thing, *Bath* proposed that *Naish* should receive 3*l.* for giving such possession, and should also take away the materials of the cottage. *Naish* never paid *Bath* any acknowledgment. *Bath* paid the 3*l.* to *Naish*; and *Naish* pulled down the cottage, carried away the materials, and delivered possession to *Carpenter*. No writing passed on the occasion. The question for the opinion of the Court was, whether the pauper, *James Naish*, had gained a settlement in the parish of Ubley.

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Jeremy, in support of the order of sessions, was stopped by the Court.

Rogers and *Erle*, contrà. A gift of land by parol confers a rightful possession, though not, in the first instance, a legal title to the land; and long possession under such a gift confers a legal title from the beginning: *Rex* v. *Calow* (*a*). That was a very similar case to the present; and *Bayley*, J., there observed, "It cannot be said that the father was in without any pretence or title, for the case states that he had a gift of the land;" and *Dampier*, J., added, "The subsequent possession legalises the former possession, and shews that it was of right." The rule of presumption is, "ut res ritè acta est;" *Keene* v. *Deardon* (*b*); and that rule is always applied where the possession is rightful to give that possession a legal title; and is always construed liberally where the object is to support a right: *Eldridge* v. *Knott* (*c*). In this case the pauper was in possession for fifteen years under the gift, which was as long as the period of possession in *Rex* v. *Calow* (*d*). But besides, in this case, at the end of fifteen years' possession by the donee, there is an express recognition of his title by the donor, the only person competent to question it; for at that time *Bath* tells the pauper he has sold the land to *Carpenter*, and asks him to give him free possession and to sell him his right. This was in 1810; and as the owner then admitted that the person in possession had a beneficial and saleable interest in the land, (the quantum of interest being

(*a*) 3 M. & S. 22.

(*b*) 8 East, 263, per Lord *Ellenborough*, C. J.

(*c*) Cowper, 214, per *Aston*, J.

(*d*) 3 M. & S. 22. The period of possession in that case was *thirty* years and more, but the Court presumed a title at the end of fifteen years, Lord *Ellenborough*, C. J., observing, "It is true that the father, at the time when the son ceased to be a part of his family, had been in possession of the estate for fifteen years (only); but he was in under some title or other, under which he has continued the possession for fifteen years more, and up to the present time; therefore, *looking at the whole*, we must infer a title in him at the former period."

for this purpose immaterial,) which interest it appears had been acquired fifteen years before,—there is an unbroken possession for thirty-five years—fifteen years by the pauper, the vendor, and twenty years since by the vendee; for the possession of the vendee is the possession of the vendor: *Rex* v. *Bitton* (*a*).

But, secondly, the pauper was the donee of an estate at will, and gained a settlement by residing on his own estate. There are only two exceptions to the established rule of the common law, that a man is irremovable from his own estate, and gains a settlement by forty days' residence upon it; and the pauper is not within either of them. The first, introduced by the statute 13 & 14 *Car.* 2, c. 12, of persons coming to settle upon tenements under the yearly value of 10*l.*, has been held to apply only to persons taking tenements by contract of renting; *Rex* v. *Bowness* (*b*), *Rex* v. *St. John's, Glastonbury* (*c*); and not to persons taking tenements by any other title, as executors, *Rex* v. *Stone* (*d*); or by marriage, *Rex* v. *Ynyscynhaiarn* (*e*); or by purchase, 9 *Geo.* 1, c. 7, s. 5, *Rex* v. *Martley* (*f*). The pauper here did not come in by contract of renting. The second exception, introduced by the statute 9 *Geo.* 1, c. 7, of persons purchasing estates for a less sum than 30*l.*, has been held not to apply to gifts of estates from natural love and affection; *Rex* v. *Marwood* (*g*), *Rex* v. *Ingleton* (*h*), *Rex* v. *Upton* (*i*). Here, the estate was given from that consideration. The gift by parol, therefore, passed an estate which, though reduced by the statute of frauds to an estate at will, is, nevertheless, sufficient to confer a settlement; *Cranley* v. *St. Mary, Guildford* (*k*).

(*a*) Burr. S. C. 631; 2 Bott, 624.
(*b*) 4 M. & S. 210.
(*c*) 1 Barn. & Ald. 481.
(*d*) 6 T. R. 295.
(*e*) 1 M. & R. 16; 7 B. & C. 233.
(*f*) 5 East, 40.
(*g*) Burr. S. C. 386; 2 Bott, 615.
(*h*) Burr. S. C. 560; 2 Bott, 621.
(*i*) 3 T. R. 251.
(*k*) 1 Str. 502. And see *Rex* v. *Duns Tew*, Burr. S. C. 398; *Rex* v. *Fillongly*, 1 T. R. 458;

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Lord TENTERDEN, C. J.—As to the first point,—there is no ground for contending that *Carpenter*'s possession is to be considered a continuance of the pauper's, because *Carpenter* purchased, not of the pauper, but of the pauper's uncle. That being the case, the utmost period of possession has been fifteen years. In the cases cited, the adverse possession continued for a period of more than twenty years. As to the second point,—there is no authority to shew that a residence upon an estate at will, of a less value than 10*l.* a year, can confer a settlement.

BAYLEY, J.—Undisturbed possession for twenty years is held to confer an estate, because it is evidence from which a court or jury may presume a grant. Here, there was only possession for fifteen years. It is said that *Carpenter*'s possession was the possession of *Naish;* but that is not so, because *Carpenter* came into possession, not under *Naish*, but under his uncle, *Bath.*

LITTLEDALE, J.—*Naish* was no more than tenant at will to his uncle; and there is no authority to shew that a mere tenant at will can gain a settlement by residing upon an estate of a less value than 10*l.* a year.

Order of Sessions confirmed.

Rex v. *Lakenheath*, 2 D. & R. 816, 1 B. & C. 51; *Rex* v. *Chediston*, 6 D. & R. 269, 4 B. & C. 234. It is, however, to be observed, that those were all cases of occupation of a tenement *of the annual value of* 10*l.*; and therefore do not seem applicable to the principal case.

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The KING v. The Inhabitants of ST. ANDREW THE LESS, CAMBRIDGE.

A person renting the tolls, and residing in the toll-house, of a navigation, is within the prohibition in 54 *G.* 3, c. 179, s. 5, and cannot thereby gain a settlement, although he uses the house as a public-house, and it is worth much more than 10*l.* a year to be let for that purpose.

TWO justices, by their order, removed *Henry Unwin*, his wife, and three children, from the parish of St. Andrew the Less, Cambridge, to the parish of Fen Ditton, both in the county of Cambridge; and the sessions, on appeal, quashed that order, subject to the opinion of this Court upon the following case:—

The conservators of the River Cam, acting under the authority of an act of parliament passed in the first year of the reign of Queen *Anne*, intituled, "An Act for making the River Cam, alias Grant, in the County of Cambridge, more navigable from Clay Hithe Ferry to the Queen's Mill, in the University and Town of Cambridge," and of another act of the fifty-third of *George* the Third, intituled, "An Act for amending and extending an Act of Queen *Anne*, for making the River Cam more navigable from Clay Hithe Ferry, to the Queen's Mill, in the County of Cambridge," are empowered, by the latter of the said acts, to let to farm the tolls, duties, and rates by the said act made payable, or any part or parts thereof, and also the messuages, buildings, yards, gardens and premises belonging, or which shall belong to the said conservators. In pursuance of this power the said conservators, on the 14th of July 1825, duly demised and by lease to farm let unto one *Thomas Nutter*, common brewer, for the term of three years, all those the tolls, duties, and rates which, by virtue of the said acts, or one of them, and the orders of the conservators of the said river, were then payable at Baitsbite Sluice on the same river, and which tolls, duties, and rates were specified in the schedule first thereunder written, and all and singular the powers and authorities by the said acts, and each of them, created and given for collecting and recovering the same; and also the messuage, sluice-house or tenement, outbuildings, yards and gardens belonging to the said sluice-

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house, together with the use of the several fixtures and effects then remaining and being in, upon, or about the said messuage, sluice-house or tenement, out-buildings, yards and gardens, and which were specified in the schedule secondly thereunder written, at the annual rent of 56*l.* 14*s.* And *T. Nutter* did thereby covenant, at his own cost, to pay and bear all taxes, rates, assessments, charges, and impositions whatsoever that should or might be charged upon the said thereby demised premises, or on the occupier or occupiers, owner or owners thereof, in respect of the same, by authority of parliament, or otherwise howsoever, for or by reason or in consequence of the said sluice-house being used or kept open as a public-house. And the conservators did covenant, at their own cost, to pay and bear all taxes, rates, assessments, and impositions whatsoever upon the thereby demised premises, by authority of parliament, or otherwise howsoever, save and except those taxes, rates, assessments, charges, and impositions which should or might be charged on the thereby demised premises, or on the occupier or occupiers, owner or owners of the same, in respect thereof, by reason or in consequence of the said sluice-house being used or kept open as a public-house. *Nutter* afterwards entered into a written agreement with *Unwin*, dated the 6th of February 1826, whereby it was agreed between them as follows:—"*T. Nutter* having hired Baitsbite Sluice, and the tolls thereof, of the conservators of the River Cam for three years from Midsummer last, hereby agrees to let the same to *H. Unwin*; and *H. Unwin* hereby agrees to hire the same of *T. Nutter* from this day for and during the remainder of the three years, at the annual rent of 42*l.*, payable half-yearly (but the said *H. Unwin* to be allowed to receive from the conservators the annual salary of 10*l.* for looking after the sluice and water), the rates and taxes to be paid by *H. Unwin*." The agreement also stipulated that *Unwin* should purchase all the beer and liquors which he might use or sell at the said sluice-house of *Nutter*, under a penalty. Baitsbite Sluice is part of the

line of navigation under the control of the aforesaid conservators, and is situate between Clay Hithe Ferry and the Queen's Mill. *Unwin*, under this agreement, entered upon all the premises so demised by the said conservators to *Nutter*. He occupied them upwards of a year, and paid a year's rent for them. It was proved that the messuage and premises had always been used as a public-house, as well as for the collection of the tolls belonging to the conservators, and that they consisted of a dwelling-house, garden, paddock, and stable, and were worth 25*l.* a year if let as a public-house, without the tolls, but only 4*l.* a year if not let as a public-house. It was also proved that *Unwin* was rated to the parish of Fen Ditton for the same as for a public-house and garden, at a rental of 4*l.* 10*s.* a year, and no more, but was not rated for the tolls; but that it was usual in Fen Ditton to rate property much below the rack rent. It was also proved that the house in question had no name except the Baitsbite Sluice House, and had no sign; that there was no high road connecting it with the village of Fen Ditton; and that the towing path was the only road passing by it.

Gunning, in support of the order of sessions. The Court of Quarter Sessions have come to the right conclusion, for the pauper acquired no settlement by this occupation in the parish of Fen Ditton. The statute 54 *G.* 3, c. 179, s. 5, enacts, "That no gate-keeper, or toll-keeper, of any turnpike-road or navigation, or person renting the tolls and residing in any toll-house of any turnpike-road or navigation, shall thereby gain any settlement in any district, parish, township, or hamlet." There was a similar provision in the statute 13 *G.* 3, c. 84, s. 56, which was considered in the case of *Rex* v. *Denbigh* (*a*). The pauper in that case resided in the toll-house, but acquired a settlement by renting a tenement distinct from the toll-house; it was argued

(*a*) 5 East, 333.

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upon the statute, that the word *thereby* included *the residence in the toll-house*, and that such residence should not be contributable to the settlement: but Lord *Ellenborough* said, the meaning of the statute was, that a settlement should not be gained by keeping the gate, *or renting the tolls*, and residing in the toll-house, but not that a settlement should not be gained aliundè in the same parish where the toll-house is situate. In *Rex* v. *North Duffield* (*a*), the principal question in discussion was, whether the tolls had passed, there being no deed; and there is a dictum of Lord *Ellenborough* that "the residence in the toll-house, if it had been of sufficient value, *might* have answered the purpose of a settlement:" but the statute of 13 *G.* 3, was not there adverted to. Here the words and the object of the statute are clear, to prevent any person from throwing a burthen upon the parish, by renting the tolls and residing in the toll-house. Here the pauper did rent the tolls, and did reside in the toll-house, of a navigation. He is, therefore, within the very words as well as within the object of the act of parliament. [*Bayley*, J. Independently of the question upon the 54 *G.* 3, I doubt whether this occupation would confer a settlement under 6 *G.* 4, c. 57. Here the subject of the renting is the house, the land, and the tolls; and for these one entire rent is to be paid.] Probably that objection might be raised successfully, but the objection upon the statute being deemed conclusive, is now alone relied on.

Alderson, contrà. The tolls were not the subject of demise from *Nutter* to the pauper, though they were from the conservators to *Nutter:* they should not, therefore, be included in the consideration of this case. The true meaning of the fifth section of the 54 *G.* 3, is to be found in the word *thereby*. By the construction contended for on the other side, that word must be rejected. The case finds that the messuage and premises had always been used as a

(*a*) 3 M. & S. 247.

public-house, and that they were worth 25*l.* a year if let as a public-house, but only 4*l.* a year if not so let. The pauper may be considered as having taken the house as a public-house, and he would gain a settlement by renting it when applied to that purpose, whether it was used as a toll-house or not. The observation of Lord *Ellenborough* in the case of *Rex* v. *North Duffield* (*a*), which has been alluded to, seems favourable to this view of the present case.

Lord TENTERDEN, C. J.—I am of opinion that the pauper acquired no settlement in the parish of Fen Ditton. He seems to me to be a person coming strictly within both parts of the description in the prohibitory clause of the statute, for he rented the tolls, and resided in the toll-house of a navigation. I think we ought not to inquire into the value of the toll-house to be let as a public-house, that being, in my judgment, immaterial, considering the express words of the statute. We should defeat the object of the legislature, if we were to decide that the pauper gained a settlement by residing in the toll-house. By deciding otherwise, we abide by the words of an act of parliament, taken in their ordinary and popular sense, which is a safe rule of construction.

The other judges concurred.

Order of Sessions confirmed.

(*a*) 3 M. & S. 247.

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The KING v. IVIE M'KNIGHT.

Where a person on one day went the round of a neighbourhood, soliciting and obtaining orders for tea, but having no tea with him; and on a subsequent day went the same round, delivering the parcels of tea previously ordered:—Held, that he was not a person "carrying to sell," or "exposing to sale," tea, within the meaning of 50 *G.* 3, c. 41, so as to be liable to a penalty for trading as a hawker without a licence.

M'KNIGHT was convicted by two justices of the peace for the county of Worcester, under the Hawkers and Pedlars act, 50 *Geo.* 3, c. 41, of hawking without a licence. On appeal, the sessions quashed the conviction, subject to the opinion of this Court upon the following case:—

The appellant was a servant of *William Gray*, a licensed tea-dealer, residing at Dudley, about four miles distant from Cradley, both in the county of Worcester, and was sent by his master from time to time (once a fortnight) round the neighbourhood to ask for orders for tea, and he was subsequently sent by his master to deliver tea in pursuance of the orders which he received when he so went round; but it was not his practice to deliver any tea at the time he so received the orders for it. On the 8th of April, 1829, he was sent round by his master with forty-four small parcels of tea, containing each a quarter of a pound, for which he had previously received orders in one of his former rounds. He was sent to deliver them to the persons who had given those orders, and when taken into custody at Cradley, at three o'clock in the afternoon of that day, he had only seventeen of the parcels in his possession. Neither he nor his master had any hawker's licence at any of the times of his so going round, either for orders or to deliver tea. The question for the opinion of the Court is, whether, upon these facts, the appellant was properly convicted of having, as a hawker and trading person going from town to town, and to other men's houses, carried to sell and exposed to sale packages of tea on the said 8th of April, 1829, and of being found trading as aforesaid, without a licence, within the meaning of the statute 50 *Geo.* 3, c. 41, he not having otherwise carried to sell, or exposed to sale, than as aforesaid.

Godson, in support of the order of sessions. The con-

viction was clearly wrong, and the sessions were right in ordering it to be quashed. The charge against the appellant is, that he carried out tea to sell, and exposed it to sale. Upon the evidence, as stated in the case, it is clear that he did neither the one nor the other. [*Bayley*, J. At any rate he did not carry out to sell—he carried the tea out to deliver—it had been sold before.] Exactly so: and for the same reason, namely, that the tea had been sold before, he did not expose it to sale. All he did was to carry out packages of tea, which he delivered in pursuance of orders previously received. He carried, therefore, to deliver, not to sell, much less to expose to sale. In *Rex* v. *M'Gill* (*a*), the case stated that the defendant, on a certain day, "carried to sell several packages of tea; and then, at the house of one *H. G.*, sold one of the said packages;" so that there the offence was complete; for the defendant carried out the tea to sell, and actually sold and delivered it, all at the same time. (He was here stopped by the Court, who called upon)

Shutt and *M'Mahon* contrà. The course pursued by the appellant is an ingenious attempt to evade the provisions of an act of parliament, which he has, nevertheless, violated, both in the letter and in the spirit of it. First, he is within the letter of the act, for when he carries the article in pursuance of the previous order, he literally "carries to sell," and "exposes to sale." The mere soliciting and receiving an order for goods, does not constitute a sale of the goods, for "sale is a transmutation of property from one man to another, in consideration of some price or recompence in value." (*b*) A sale passes the property; but here no property passed, and consequently no sale took place, until the tea was actually delivered; all that occurred before was an offer to sell, on the one hand, and a promise to buy, on the other; and they were both condi-

(*a*) 3 D. & R. 377; 2 B. & C. 142. (*b*) 2 Bl. Com. 446.

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tional—the one on the price being paid—the other on the article being brought and approved of. [*Bayley*, J. When that promise was once given could it be revoked? Can a man who has given an order for goods refuse to take them when they are brought?] He may refuse to take, as the other may omit to bring, without subjecting himself to an action. All that passes in the first instance is mere matter of treaty; when, in pursuance of that treaty, the article is brought and delivered, then, and not till then, is the sale complete; and then the bringing is a "carrying to sell," and the delivery is an "exposing to sale," within the very words of the act. [*Bayley*, J. If going round the country to collect orders is a case within the act, every traveller for a London house must have a hawkers' and pedlars' licence.] Secondly, this case is within the spirit and mischief of the statute, which, like all statutes of a similar nature, must be so construed as to advance the remedy and prevent the mischief, *Heydon's* case (*a*). The mischief was, that hawkers and pedlars were enabled to carry on profitable trades in the country, without contributing to any of its burthens, and to the great prejudice of the resident trader, upon whom these burthens attached (*b*). The act of carrying to sell *after* orders received, differs from that of carrying to sell *without* orders received only in this; that in the one case the hawker has rather a more certain expectation of selling than in the other. But the mischief is precisely the same in both cases, for he carries on a profitable trade in the towns through which he passes, without contributing to the burthens of those towns, and to the great prejudice of the resident trader.

Lord TENTERDEN, C. J.—The sale and the delivery of goods are two distinct acts. The charge against this defendant was, that he carried to sell, and exposed to sale,

(*a*) 3 Co. Rep. 7 b.

(*b*) See the observations of *Graham*, B. in *Attorney-General* v. *Tongue*, 12 Price, 60; and of *Bayley*, J. in *Rex* v. *M'Gill*, 3 D. & R. 381; 2 B. & C. 147.

certain packages of tea. The proof was, that on one occasion he received orders from several customers, and on a subsequent occasion carried the packages for the purpose of delivering them to the customers who had given those orders. I am of opinion that was not either a carrying to sell, or an exposing to sale, within either the words or the spirit of this act of parliament.

BAYLEY, J.—I am of the same opinion. The case is clearly not within the words of the act of parliament, and I can only collect the spirit from the words. The legislature may have intended to make a distinction between a person carrying goods with him for the purpose of selling them, and one who delivers goods in pursuance of a previous order. If the defendant had taken the tea with him in the first instance, so as to enable his customers, by an inspection of it, to judge whether they would buy or not, that would have been both a carrying to sell and an exposing to sale; but going a round to apply for orders, without having the goods with him, he is in a very different situation. There is a difference between a bargain for and a delivery of goods. A man who carries goods for the purpose of delivering them in pursuance of an order previously given, has a right to have the price paid if the goods correspond with the order, and may enforce that right in an action for goods bargained and sold. Here, the defendant did not carry to sell, but to deliver goods previously bargained for.

LITTLEDALE, J.—The charge against the defendant is, that he carried to sell, and exposed to sale, certain parcels of tea. There is no pretence for saying that there was any exposing to sale, nor do I think that there was any carrying to sell. Those words import a future contract, but here the bargain to sell had been made before the goods were carried. The defendant had contracted to sell and deliver the goods, and he was carrying them to the persons who had contracted to buy and pay for them. The question is,

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not whether the property had passed, but whether the defendant can be said to have carried to sell within the meaning of this act of parliament, and I am of opinion that he cannot.

Order of Sessions, quashing the conviction, confirmed.

The KING *v.* The Inhabitants of EDINGALE.

A master having said to a pauper, he thought he would suit him, the pauper said, his mother would like to make him an apprentice. The master said, he would not take him apprentice, because if he did he should offend the farmers; he would take him on an agreement for four years. A week afterwards it was agreed between the pauper's father-in-law and the master, that the pauper should serve him four years, to learn his trade, to have meat, drink, washing and lodging the whole time, and 2*s.* 6*d.* a week for the last two years:—Held, that the principal object of the parties being that the pauper should learn the trade of the master, this was a defective contract of apprenticeship, and not a contract of hiring and service.

BY an order of two justices, *Henry Brown*, his wife and their children, were removed from the township of Edingale to the township of Clifton and Haunton, both in the county of Stafford; and the sessions, on appeal, quashed that order, subject to the opinion of this Court upon the following case:—

The pauper, *Henry Brown*, before the death of his father, which took place about thirty years ago, when the pauper was ten or eleven years of age, had used to work with his father at his trade of a tailor. After the death of his father, he was put by his mother from time to time to work with other tailors, who paid him for the work he did. At the age of fourteen he went to live with *John Tricklebank*, a tailor residing in the township of Clifton and Haunton, under an agreement, the circumstances of which were as follow:—The pauper first saw *Tricklebank* when he went over to his shop on an errand for a suit of black. *Tricklebank* said the pauper was just such a one as he wanted; he thought he would suit him. The pauper said his mother would like to make him an apprentice. *Tricklebank* said he would not take him apprentice, because, if he did, he should offend the farmers; he would take him on

agreement for four years. A week after this, *Thornton*, the pauper's father-in-law, and the pauper, went over again to *Tricklebank*, and *Thornton* agreed with him that the pauper should serve him four years. He was to go to him to learn his trade; to have meat, drink, washing and lodging, the whole time; to receive no money for the first two years, but 2*s.* 6*d.* a week for the last two years. It was said, at the time when the agreement was made, that the pauper was to go to him to learn his trade. When the pauper had lived with *Tricklebank* under this agreement about a year and eight weeks, his father-in-law having neglected to supply him with clothes, *Tricklebank* agreed with the pauper to give him 1*s.* 6*d.* a week from that time for the remainder of the term, instead of 2*s.* 6*d.* a week for the last two years. In the third year the pauper, having quarrelled with his master, ran away, and went to his mother at Tamworth; upon which he was taken by *Tricklebank* before a magistrate, who made him return to his master, with whom he continued to live until the expiration of the four years, and remained four days over to make up the lost time. During the whole time that he thus lived with *Tricklebank* he worked at his trade of a tailor, and did nothing else. He slept in the township of Clifton and Haunton all the time.

Whateley, in support of the order of sessions. The Court of Quarter Sessions were of opinion that the facts appearing upon the face of the agreement in this case, constituted an imperfect contract of apprenticeship, and not a contract of hiring and service: and they were right. The reported cases upon this subject are very numerous, and it is perhaps impossible to reconcile them all (*a*); but the

(*a*) See *Rex* v. *Tipton*, 9 B. & C. 888, 4 M. & R. 703, where *Bayley*, J., said, "We despair of reconciling all the cases upon this subject." In that case the pauper, an adult, contracted to serve a plumber as an articled servant for four years, to learn his trade, at weekly wages; to be considered as an out-door apprentice; to do

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rule recently laid down in *Rex* v. *St. Margaret's, King's Lynn*(a), and subsequently acted upon in *Rex* v. *Combe*(b), must now be taken as the governing rule upon all questions of this kind, and is decisive of the present case. It is this:—"Where it appears, from all the circumstances, that the parties, at the time of making the contract, intended to create the relation of master and apprentice, the contract must be construed as one of apprenticeship; and then, if it is a defective apprenticeship, no settlement can be gained by service under it. Where, on the other hand, it appears that the parties intended to create the relation of master and servant, the contract must be construed as one of hiring and service, and a settlement will be gained by service under it"(c). Here, the object of the parties was, that the pauper should learn the business of a tailor; therefore their intention was to create the relation of master and apprentice; and the contract must be construed as an imperfect contract of apprenticeship.

gardening or any other work his master set him about; and, when ill, not to receive wages; the master agreeing to teach him his trade: and that was held to be not a contract of hiring and service, but an imperfect contract of apprenticeship.

(a) 9 D. & R. 160; 6 B. & C. 97. There a shoemaker proposed to the mother of a boy to take him to learn his business. The boy was to serve four years, was to board and lodge with his master, and was to have half of what he earned. The mother consented, and the boy served four years upon those terms. No indentures were executed, on account of the poverty of the mother; and no premium was paid. It was held, that this was not a contract of hiring and service, but a defective contract of apprenticeship.

(b) 2 M. & R. 30; 8 B. & C. 82. There the pauper was hired by his uncle, a carpenter, to learn his trade, and was to do any other work as well as that of a carpenter. His uncle was to find him part of his food and clothing, but he was to lodge with his father. The pauper served his uncle on these terms five years. At the end of two years it was proposed to draw up indentures, to exempt the pauper from the militia; but none ever were drawn up. It was held, that this was not a contract of hiring and service, but an imperfect contract of apprenticeship.

(c) Per *Bayley*, J., 9 D. & R. 163.

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Campbell, *Shutt* and *M'Mahon*, contrà. It is clear from the facts stated in the case, that the intention of both parties to this contract was, that it should be one of hiring and service, and not one of apprenticeship. The pauper, indeed, proposed in the first instance to serve as an apprentice, but the master refused to take him as an apprentice, assigning a reason for his refusal; the pauper acquiesced, and no more was said upon the subject. That sufficiently distinguishes this case from those of *Rex* v. *St. Margaret's, King's Lynn* (*a*), and *Rex* v. *Combe* (*b*); and then *Rex* v. *Burbach* (*c*) is an authority for holding that the contract here was one of hiring and service. There the father of the pauper contracted with *J. S.* that his son should be with him, and should work with him for two years, and have what he got, and should allow 2*s.* a week out of his gains to *J. S.*, viz. 1*s.* for teaching him the business of a frame-knitter, 9*d.* for the rent of a frame, and 3*d.* for the standing: and it was held that this was a contract of hiring and service, and not of apprenticeship.

Lord TENTERDEN, C. J.—The question is, whether the contract between the master and the pauper is to be considered a contract of apprenticeship or of hiring and service. If that was a question of fact, as it may be, the sessions have decided it; and we cannot disturb their decision. If it is a question of law for our decision, I am of opinion that the contract was one of apprenticeship, and not of hiring and service. We must form our judgment of the nature of the contract from the substance of the bargain between the parties. It appears that when the pauper first saw the master, the latter said he would not take him as an apprentice, because if he did he should offend the farmers; but at the time when the agreement was finally made between the master and the pauper's father-in-law, it

(*a*) 9 D. & R. 160; 6 B. & C. 97.

(*b*) 2 M. & R. 30; 8 B. & C. 82.

(*c*) 1 M. & S. 370.

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was stated that the pauper was to go to him to learn his trade. That being the object of the parties, expressed at the time of making the agreement, I cannot distinguish this from the case of *Rex* v. *Combe* (*a*), which followed shortly after that of *Rex* v. *St. Margaret's, King's Lynn* (*b*), in which the master offered to take the pauper to learn his business; and that being the object for which he was to be taken, the Court thought that there was not sufficient to warrant the sessions in finding that the relation of master and servant subsisted between those parties. In *Rex* v. *Burbach* (*c*) there was no express contract that the master should teach the pauper his trade, and besides, that case was decided, as was observed by my brother *Bayley* in *Rex* v. *St. Margaret's, King's Lynn* (*d*), upon the ground that there was nothing to shew that the parties had intended to create the relation of master and apprentice. I am, therefore, of opinion that the order of sessions in this case ought to be confirmed.

The other judges concurred.

Order of Sessions confirmed.

(*a*) 2 M. & R. 30; 8 B. & C. 82.
(*b*) 9 D. & R. 160; 6 B. & C. 97.
(*c*) 1 M. & S. 370.
(*d*) 9 D. & R. 164.

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Plaintiffs, merchants at Liverpool, circulated catalogues of goods to be sold by auction containing this condition:—"Payment on delivery of bills of parcels, by good bills on London, to the satisfaction of the sellers, not exceeding three months' date, to be made equal to cash in four months." *L.* & *W.*, brokers at Liverpool, sent a catalogue to defendants, merchants in London, who directed *L.* & *W.* to buy certain lots, which they bought accordingly. Before the sale began the auctioneer stated that "payment by known buyers" was to be "the usual

ASSUMPSIT for goods sold and delivered, with the money counts. Plea: non assumpsit, and issue thereon. At the trial before *Parke*, J., at the last assizes for the county of Lancaster, the case was this:—The plaintiffs were importers of ivory at Liverpool; the defendants were dealers in ivory at London. The action was brought to recover the value of eight lots of ivory, alleged to have been purchased of the plaintiffs by Messrs. *Lloyd* and *Williams*, who were brokers at Liverpool, for and on account of the defendants, under the following circumstances:—The plaintiffs had circulated catalogues announcing that a quantity of ivory would be sold by auction by *Shand* and *Horsfall* on the 9th of May, 1829, subject, among others, to the following condition of sale:—"Payments to be made on delivery of bills of parcels by good bills on London to the satisfaction of the sellers, not exceeding three months date, to be made equal to cash in four months from this date." *Lloyd* and *Williams*, who had been frequently employed by the defendants to purchase ivory for them, sent one of these catalogues, with the conditions annexed, to the defendants, and in return received from them directions to buy certain lots, which they did accordingly, to the amount of 1081*l.* 2*s.* 2*d.* Before the sale began, the auctioneer, in reading the conditions of sale, made the following verbal alteration as to the mode of payment:—"Payment, by known buyers, the usual credit of two and two months. By strangers, on delivery of the bill of parcels, by good bills on London to

credit of two and two months." *L.* & *W.*, being known buyers, obtained the goods without giving bills, and forwarded them to defendants in London, with an invoice, stating that "payment" was to be "equal four months cash," and drew on defendants for the amount by a bill at four months from the day of the sale, which defendants accepted and paid when due. Within two months after the sale *L.* & *W.* failed, never having given plaintiffs bills for the price of the goods, whereupon plaintiffs sued defendants for the price;—Held, that plaintiffs could not recover, as they had by their own catalogue led defendants to believe that *L.* & *W.* had given them bills for the goods, and had thereby induced defendants to accept and pay the bill drawn on them by *L.* & *W.*

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the satisfaction of the sellers, not exceeding three months date, to be made equal to cash in four months from this date." After the sale, *Lloyd* and *Williams* delivered to the auctioneer the following bought note:

"Messrs. *Shand* and *Horsfall*.

"Sirs,—We have this day bought from you the following lots of ivory; viz. (the lots were then described) with customary allowances. Payment two and two months.

(Signed) *Lloyd* and *Williams*."

Shand and *Horsfall* afterwards sent an invoice in the same form to *Lloyd* and *Williams*, to whom the ivory was delivered, and they forwarded it to the defendants, with an invoice as follows:—

"*R. Fauntleroy* and Son, per *Lloyd* and *Williams*.

"Bought of *Horsfall* and *Tobin*, per *Shand* and *Horsfall*,

"Eight lots Elephant teeth. Payment equal four months cash."

They then set out the particulars, charging the amount, including brokerage and commission 12*l.* 7*s.* 4*d.*, at 1093*l.* 9*s.* 6*d.*; for which amount they, a few days afterwards, drew upon the defendants by a bill at four months, dated the 19th of May, the day of the sale, which bill the defendants accepted and paid. Long before that bill fell due *Lloyd* and *Williams* stopped payment, upon which the plaintiffs, stating that they had then for the first time learned that the defendants were the real buyers, upon which fact there was conflicting evidence, demanded payment of them. The defendants declined making this payment, stating as their reason, that they had already accepted a bill in favour of *Lloyd* and *Williams* for the amount, which would be paid when due. The plaintiffs waited till that bill had become due, and had been paid, being more than four months after the sale, and then com-

menced the present action. It was contended for the plaintiffs, that as they were ignorant at the time of the sale that *Lloyd* and *Williams* purchased as agents and not as principals, they had a right to resort to the principals as soon as they ascertained who they were. But it was suggested by the learned judge, and contended by the counsel for the defendants, that they had not authorized *Lloyd* and *Williams* to contract for them upon any other terms than those contained in the catalogue and conditions of sale transmitted to them; that the only contract so authorized by them was for payment on delivery of bill of parcels; that the contract made by *Lloyd* and *Williams* was for payment at two and two months; that the two contracts were essentially different; and that, under these circumstances, the defendants were not bound by the latter, which was the contract relied on for the plaintiffs. The learned judge, being of opinion that this objection was fatal to the plaintiffs' right to recover, directed a nonsuit.

On a former day in this term,

F. Pollock moved for a rule nisi for setting aside the nonsuit, and for a new trial. The plaintiffs were not concluded by their dealing with persons who were really only agents, though they held themselves out as principals, but had a right to resort to the real principals, so soon as it was ascertained who they were. The action, therefore, is maintainable. Payment to an agent does not exonerate a principal, unless it is an authorized payment. Here the payment to the broker was an unauthorized payment, and the principals should have looked to the application of the bill which they accepted. The invoice sent by the auctioneers to *Lloyd* and *Williams* mentioned the terms upon which payment was to be made; and as the defendants afterwards received and kept the ivory, they must be presumed to have received it upon the terms contained in that invoice. [*Parke*, J. I cannot think so. It did not appear that that invoice ever reached the hands of the defendants,

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or that they ever had any knowledge of its contents, and it contained a deviation from the only contract they had ever authorized their agents to make. Can they be bound by a contract which they did not authorize their agents to make, and which they did not ratify after it was made?] The deviation from the original mode of payment was only as to time, and the time at which the payment was to be made is not material; for in every case of goods bought, to be paid for by a bill at a particular date, the vendor may sue generally for goods sold and delivered, as soon as the time arrives when the bill agreed to be given would become due.

Cur. adv. vult.

The judgment of the Court was now delivered, as follows, by

Lord TENTERDEN, C. J.—It appeared at the trial of this cause, that before the ivory in question was sold, catalogues had been circulated by the plaintiffs containing certain conditions of sale. One of those catalogues was transmitted to the defendants, who thereupon sent orders to their agents to make certain purchases on their account. The agents made the purchases accordingly, and sent the ivory to the defendants in London, with an invoice stating the mode of payment in the same terms as those contained in the conditions of sale. It further appeared, that before the sale began the auctioneer stated, that known buyers would be allowed to pay, at the end of two months, by bills payable at two months from that time; and *Lloyd* and *Williams*, the agents for the defendants, being known buyers, were allowed to have the ivory without giving bills at the time; and they immediately drew on the defendants, who accepted their draft for the amount. My brother *Parke* at the trial was of opinion that no other contract could be substituted for that which the defendants in the first instance authorized their agents to make, and on that ground directed a nonsuit. That is a very important

question, and, as it is not essential to the decision of this case, we avoid giving any opinion upon it (*a*). But, inasmuch

(*a*) The nature of the difficulty which pressed upon his lordship's mind, with respect to the point upon which the nonsuit proceeded is not stated. It was probably this. The defendant empowered *Lloyd* and *Williams* to purchase ivory, to be paid for by good bills on delivery. *Lloyd* and *Williams* bought upon credit, *viz.* at two months. This contract *Lloyd* and *Williams* had no authority to make, and the defendants might have repudiated it. But they accepted the goods. That acceptance cannot be considered as an acceptance upon the contract to pay by good bills on delivery, because the plaintiffs had never sold on those terms. If, as between the plaintiffs and defendants, the defendants were bound to know what their agents *Lloyd* and *Williams* had done, then the acceptance of the goods would be a ratification of the actual contract at two and two months. See Lib. Ass. Anno 27, fo. 133, pl. 5; *Reniger* v. *Fogassa*, Plowd. 11 b. If the defendants were not bound to know what their agents had done, then either the acceptance of the goods without a previous valid contract of sale, would amount to an implied sale upon a quantum valebant, or the property would still remain in the plaintiffs, and the interference of the defendants with those goods would have been a tortious conversion, and the question then would be, whether the plaintiffs might not waive the tort, and declare for goods sold and delivered. *Vide Lightly* v. *Clouston*, 1 Taunt. 112; *Hill* v. *Perrott*, 3 Taunt. 274; *Foster* v. *Stewart*, 3 Maule & Selw. 191; *Abbott* v. *Barry*, 5 B. Moore, 98; *Edmeads* v. *Newman*, 2 Dowl. & Ryl. 568; 1 Barn. & Cressw. 418; 1 Chitt. Plead. 5th ed. 112; Ibid. 388. The case in 27 Assise was this: "A poor man sued a bill of trespass in the Court of King's Bench, then (in M. T. 1352) held at Kingston, in Surrey, against *W. de W.* Serjeant-at-Arms, of a horse and an ox, wrongfully driven away,—who pleaded not guilty. And it was found that the bailiff of *W.* had sold the horse to the plaintiff for certain money, and that *W.* when he came into the country retook the horse. And it was asked of the jurors whether the bailiff was known as his bailiff, who (upon which the jurors) said, Yes, and that he had sold* other beasts at the market; and it was asked if he had a special warrant to sell the horse, who (upon which the jurors) said, No.† With respect to the ox, (in *droit* del boef,) it was found that the bailiff had pledged the ox to the plaintiff for 12 bushels of wheat, of the price of 12*s.*, so that if he did not pay &c. the plaintiff should have the ox. And it was found that the wheat came to the profit of the

* For which Lord Brooke, in abridging this case (*tit.* Trespass, pl. 245,) puts "had *used* to sell."

† See distinction between a general and a special agent, *Whitehead* v. *Tuckett*, 15 East, 400, 408.

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much as the plaintiffs, by circulating a catalogue with certain conditions of sale, a copy of which was transmitted to the master, and without payment made.* And as well for the one as the other, the plaintiff recovered his damages." *S. C.* abridged Fitz. Abr. *tit.* Trespass, 230; Bro. Abr. *tit.* Contract, pl. 21; Ibid. *tit.* Pledges, pl. 16; Ibid. *tit.* Trespass, pl. 245.

Some confusion has arisen with respect to the time at which upon the sale of goods the property in the specific articles sold is transferred from the seller to the buyer. According to the Civil Law, and the present, or at least the old French Law, and all other systems of jurisprudence founded upon the Civil Law, the property remained in the seller until a delivery either actual or constructive. But the right to the benefit of accretions to the property, and of any other improvements therein, on the one hand, and the liability to the risk of destruction or injury to the property, (periculum rei venditæ,) on the other, were transferred to the buyer by the very contract of sale, if the subject of a sale were a specific individual chattel (certum corpus), or in the case of a bargain for quantity only, then upon the subsequent designation of a particular article, by selection, by measurement, or otherwise.

As after the transfer of the property, the risk (periculum rei venditæ) attaches to the buyer, the converse seems to have been assumed by English lawyers, who appear to have considered that because the *risk* passes upon the completion of the contract, accompanied or followed by the designation of a specific article as the subject-matter of the sale, therefore the *property* vested also. This appears to be now the settled law of England upon this subject; and it may be traced as far back as the reign of *Edward* 4; for in H. 18 *Edw.* 4, fo. 21, pl. 1, *Bryan*, C. J. of C. P. whose opinion upon this point had been disputed in the preceding year (*ante*, vol. ii. 568 n.) by *Littleton*, J. (the author of the Tenures) says obiter, "If I sell my horse for 10*l.* it is lawful for me to retain the horse until I am paid; and yet I shall never have an action of debt on the contract until the horse be delivered, *and it is clear that by the bargain the property was in him who bought the horse.* But if the buyer tender the money, and he (the seller) refuses, then he (the buyer) may seize the horse, or have an action of detinue, or an action of trespass, at his pleasure." From this dictum it appears that the action for goods bargained and sold, but not delivered, was then unknown; and yet if the property passed by the *contract*, there would be no reason why such an action of debt on the contract as debt for goods bargained and sold should not lie.

In the reign of *Henry* 2, the law of England in this respect is thus stated by Glanville, "A purchase and sale are effectually com-

* Et son payment fait, in both editions, but "son" appears to be misprinted for "sauns."

defendants, naturally led them to suppose that *Lloyd* and *Williams* could not have obtained the ivory without giving

pleted when the contracting parties have agreed upon the price, *provided that a delivery of the thing bought and sold* has taken place, or that the price or part of it has been paid, or at least that earnest has been paid and accepted." He then goes on to state, that after delivery or payment, both parties are bound by the contract, unless some power of determining the contract, as upon trial of the goods, &c. was reserved; but that where there is only a payment of earnest the purchaser may forfeit the earnest and abandon the contract. Glanv. lib. 10, cap. 14.

In constructing the Code Civil the French legislators would at first sight appear to have adopted the modern English principle, as in the case of Revendication, see 2 Nev. & Mann. 650 (*c*). See Code Civil, No. 1588, where it is said—" the sale is perfect between the parties, and the property is acquired *de jure* by the buyer as against the seller, as soon as they are agreed upon the thing, *e. g.* the specific article, and upon the price, although the thing has not been delivered, nor the price paid," unless by the terms " la proprieté est acquise *de droit* à l'acheteur à l'égard du vendeur," we are to understand that (as in the Civil Law,) the buyer has acquired merely jus ad rem and not jus in re, and that the words " acquise *de droit*," are used in contradistinction to " acquise *de fait*." Indeed if the intention of No. 1588, of the Code Civil, was to effect so important a change in the law of France, it might have been expected that the legislators would have expressed themselves with at least as much distinctness as in No. 938, (infrà) when merely adopting and re-enacting the established law.

The rule of the Civil Law and the old French Law upon this subject, and the departure from that rule in the English Courts, is stated in a note to *Bailey* v. *Culverwell*, *ante*, vol. ii. 566 (*d*), and to *Dixon* v. *Yates*, 2 Nev. & Mann. 202 (*b*); but it was not intended, by what is said in the former of those notes, to deny that the law of England had long been settled upon this point.

With respect to gifts of chattels inter vivos, the rule has been established that gifts by *parol* are revocable and incomplete, until acceptance (*i. e.* acquiescence in the gift) by the donee, but that gifts by *deed* are perfect and complete, and vest the property in the donee until disclaimer. And that after acceptance in the former case and until disclaimer in the latter, the property vests in the donee without any delivery of the subject-matter of the gift. Perk. *tit.* Grant, 57; 2 Roll. Abr. *tit.* Grants (X.); Com. Dig. *tit.* Biens (D 2.) So in the Code Civil, No. 938, it is said, " a donatio inter vivos duly accepted, shall be perfect by the sole consent of the parties; and the property in the articles so given shall be transferred to the donee, without the necessity of any other delivery."

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good bills on London, and that therefore they might safely accept the bill drawn by *Lloyd* and *Williams* for the amount; if we held that the acceptance and payment of that bill did not exonerate the defendants from the present demand, it would be an exceedingly hard case; for they have fallen into the difficulty, being misled by a document put forth by the plaintiffs themselves. Upon this ground we are of opinion that the plaintiffs are not entitled to recover, and, consequently, that the nonsuit ought not to be disturbed.

Rule refused.

But upon a donatio mortis causâ, the property does not vest in the donee without delivery. *Smith* v. *Smith*, 2 Stra. 955; *Burn* v. *Markham*, 2 Marshall, 532. The donatio mortis causâ is not recognised in France, *vide* Code Civil, No. 893.

In *Irons* v. *Smallpiece*, 2 Barn. & Ald. 551, these distinctions appear to have been overlooked.

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A boy was bound apprentice in 1827 by indenture, upon a premium of 30*l.* which was agreed to be paid, and for which a bill was given. The indenture bore a 1*l.* stamp only. The apprentice served the master five months, when a difference arising between the master and the father, and it being discovered that the stamp was insufficient, the apprentice left the master. In an action by the indorsee against the acceptor of the bill:—Held, that as the apprentice had been maintained and instructed by the master for five months, and might have enforced a continuance of that maintenance and instruction, by causing the indenture to be properly stamped, under 20 *G.* 2, c. 45, s. 5., there was not a total failure of consideration for the bill, and the action upon it was maintainable.

ASSUMPSIT, by the plaintiff, as indorsee, against the defendant, as acceptor of a bill of exchange drawn by *James Pullman*, for 28*l.*, dated 22d October 1827, payable two months after date. Plea, non assumpsit, and issue thereon. At the trial before Lord *Tenterden*, C. J., at the London adjourned sittings after Michaelmas term 1828, the plaintiff, by his lordship's direction, had a verdict, subject to the opinion of the Court upon the following case:—

The plaintiff, at the trial, having proved the handswriting of *Pullman* as drawer and indorsee, and of the de-

fendant as acceptor, of the bill; the defendant first proved, by way of answer, that on the 2d December, at half-past nine at night, a notice was served at the office of the plaintiff's attorney, whereby he was required, on the trial of the cause, to prove the time when he received the bill, and the consideration paid or given by the plaintiff to *Pullman* for the same. The plaintiff, however, did not adduce any evidence either as to the time when he obtained possession of the bill or of the consideration given by him for the same. The defendant then proved that his son had been bound apprentice to *Pullman* by an indenture dated the 19th of October, 1827; that a premium of 30*l.* was agreed to be paid as an apprentice fee, of which 2*l.* was to be taken out in liquor; and that the bill in question was accepted by the defendant, and handed over to *Pullman* in payment of the residue. The indenture of apprenticeship was in the usual form, and was on a 1*l.* stamp, the premium expressed in it being 30*l.*; and the apprentice was to serve for seven years. The apprentice entered into his master's service, and served, in pursuance of the indenture of apprenticeship, for the term of five months and a little more, when a difference arising between the master and the father, and it having been discovered that the stamp on the indenture, being but a twenty-shillings stamp, was insufficient, the boy left his master's service.

Upon this state of facts, the defendant contended that the indenture, according to the stat. 55 *Geo.* 3, c. 184, sched. 1, tit. "Apprentice," ought to have borne a 2*l.* stamp; and that not being so stamped, the consideration for the bill failed.

That the statute 8 *Anne*, c. 9, s. 38, requires that indentures of apprenticeship executed within fifty miles of London shall be brought to be stamped at the head office within three months after the date thereof. That sect. 39 of the same statute directs, that unless the duties payable were paid within the time aforesaid, the indentures shall be void, and not available in any court or place, or to any purpose whatsoever. That the statute 5 *Geo.* 3, c. 46, s.

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19, requires the duty to be paid in one month, or the indentures will be void; and the master forfeits a penalty, and the apprentice can acquire no right under the same.

That the duty payable on the indenture in the present case was not paid within three months after the date thereof, and was not at the time of the trial impressed thereon. That the statute 42 *Geo.* 3, c. 23, s. 7, authorizing the stamping indentures of apprenticeship after the proper time, was a temporary act no longer in force.

That the statutes 9 *Anne*, c. 21, s. 66, and 18 *Geo.* 2, c. 22, ss. 23 and 24, make it the duty of the master, and not of the apprentice, to get the indentures stamped in due time.

The plaintiff, on the other hand, contended that the statutes 12 *Anne*, st. 2, c. 9, s. 23; 20 *Geo.* 2, c. 45, ss. 5 and 6; 37 *Geo.* 3, c. 136, s. 2; and 44 *Geo.* 3, c. 98, s. 24; modify the operation of the statutes relied on by the defendant, and that the bill was not to be considered, even as between the drawer and the acceptor, as altogether without consideration; and even if it were so, the plaintiff contended that he was still entitled to recover, he not being shewn to be cognizant of the supposed want of consideration, or to have received the bill otherwise than in the ordinary course of business, and not being bound by law upon so insufficient a notice as he received to prove the consideration.

On a former day in this term the case was argued by *Coltman*, for the plaintiff. First, the stamp was sufficient. Where the premium does not exceed 30*l.*, the Stamp Act(*a*) imposes a duty of 1*l.* only: here the real premium given was only 28*l.* for it does not appear that the 2*l.*, said to be taken out in liquor, was for the use of the master. Secondly, there was a sufficient consideration. There may have been a partial failure of consideration; but it is a settled principle, that a partial failure of the consideration for which a bill or note is given, is no ground of defence to an action on the bill or note(*b*). The

(*a*) 55 G. 3, c. 184, schedule, part 1, "Apprenticeship."

(*b*) See *Obbard* v. *Betham*, *ante*, p. 632, and the cases there cited.

case of *Jackson* v. *Warwick*(*a*) may perhaps be cited on the other side as an authority to shew that in this case there is a total and not a partial failure only of consideration; but admitting the propriety of that decision, which perhaps might be questioned, there is a material distinction between that case and the present. There the premium was not mentioned in the indenture at all, which was an incurable defect, that rendered the indenture absolutely and for ever void. Here, the premium is correctly set out in the body of the indenture, and the only defect, if any, is in the stamp, which may be cured, by virtue of the statute 20 *Geo.* 2, c. 45, s. 5, by adding the proper stamp, and the indenture be thereby rendered valid. It cannot therefore be successfully contended that the consideration in this case has failed *in toto*; more especially as the apprentice was actually maintained by the master for a period of five months and upwards, and then quitted the service of his own accord. Thirdly, even if the drawer in this case could not have recovered against the acceptor, still the plaintiff, being the indorser, may. Every indorsement primâ facie imports a consideration. The acceptor cannot, by merely proving that the bill was without consideration as between himself and the drawer, impose upon the indorsee the duty of proving the consideration which he gave for it. The giving notice to the holder that he will be required to prove the consideration given by him for a bill, does not compel him to do so: the only effect of that is to enable the acceptor to impeach the consideration, which without giving such notice he is not allowed to do. Where, indeed, a bill has been obtained from the acceptor

(*a*) 7 T. R. 121. It was there held that "no action can be maintained by the plaintiff on a note given to him by the defendant, as an apprentice fee with his son, who was to be bound to the plaintiff, if it appear that the indenture executed was void by the statute, for want of the insertion of such premium therein, and of a proper stamp in respect of the same; although the plaintiff did in fact maintain the apprentice for some time, and until he absconded.

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by force or fraud, the duty of proving consideration is imposed upon the holder; but the rule has never yet been carried beyond that point, and its extension would be a serious clog upon the circulation of bills and notes, and would materially diminish their utility for the purposes of commerce.

Gurney, contrà. The indorsee of a bill or note stands, for many purposes, in precisely the same situation as the drawer, and is equally compellable, upon notice, to prove that he or some preceding party took the bill or note bonâ fide and for value; *Duncan* v. *Scott* (*a*), *Rees* v. *Marquess of Headfort* (*b*), *Solomons* v. *The Bank of England* (*c*). In this case the apprentice served for five months under the indenture, and it being then discovered that the stamp was insufficient, left his master's service. The indenture, being void, there was no consideration for the bill as between the drawer and the acceptor, therefore it was incumbent on the plaintiff, as the indorsee, to prove, after notice, that he had given consideration for it. The means of proof in such a case are in the plaintiff, and the burden of proof ought, therefore, to be upon him; the defendant cannot be called upon to prove a negative. In *Thomas* v. *Newton* (*d*), which was an action by the indorsee against the acceptor of a bill, the defendant having shewn that there was originally no consideration for the bill, Lord

(*a*) 1 Campb. 100. It was there held, that "in an action by the indorsee against the drawer of a bill, if it appear that the defendant drew the bill without consideration, and under duress, it is incumbent on the plaintiff to prove that he gave value for it, although it was indorsed to him before it became due."

(*b*) 2 Campb. 574. It was there held that "in an action by the indorsee of a bill of exchange, if it appear that a prior party was defrauded out of it, the plaintiff is bound to prove what consideration he gave for it."

(*c*) 13 East, 135, n. It was there held, that "the holder of a bank note is primâ facie entitled to prompt payment of it, and cannot be affected by the previous fraud of any former holder in obtaining it, unless evidence be given to bring it home to his privity."

(*d*) 2 Car. & P. 606.

Tenterden held that it lay upon the plaintiff to shew that he, or some prior indorsee, had given value for it; and in *Dandridge* v. *Corden*(*a*), his lordship again ruled the same point. Assuming that the indenture might at one time have been made valid by impressing a sufficient stamp upon it, that cannot now be done; and the indenture being wholly void, there was no consideration for the acceptance. In *Jackson* v. *Warwick*(*b*), it was held that no action could be maintained by the plaintiff upon a note given to him by the defendant as an apprentice fee, if the indenture executed was void; and *Scott* v. *Gillmore*(*c*) shews that if a bill or note is founded partly on an illegal consideration, and partly on a good consideration, the illegality will taint the whole bill or note, and will bar the claim of the holder upon it in toto. As to the stamp, it was held in *Rex* v. *Chipping Norton*,(*d*) that an indenture of apprenticeship executed before the passing of the statute 44 *Geo.* 3, c. 98, must be stamped with the premium stamp within the time prescribed by the statute 8 *Ann.* c. 9; and that where such an indenture was stamped at the time of its being produced in evidence with the stamp required by the statute 55 *Geo.* 3, c. 184, but not within the time prescribed by the statute 8 *Ann.* c. 9, the indenture was altogether void.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord TENTERDEN, C. J., who after recapitulating the facts of the case, thus proceeded :—We are of opinion that there was not, in this case, a total failure of consideration for the bill. If the father had paid the premium in money, instead of giving the bill for it, he could not, under the cir-

(*a*) 3 Car. & P. 11.
(*b*) 7 T. R. 121.
(*c*) 3 Taunt. 226.
(*d*) 5 Barn. & Ald. 412. And see *Rex* v. *Preston*, 3 Nev. & Man. 31; 5 Barn. & Adol. 1028.

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cumstances of this case, have recovered it back; for the son was not only maintained by the master for some time, but might have compelled the master to continue his maintenance and instruction, by causing the indenture to be duly stamped. There was not, therefore, a total failure of consideration for the bill, and that being so, the circumstances proved would not have constituted a defence even in an action brought by the drawer against the acceptor, and, consequently, they are no answer to an action brought by the indorsee against the acceptor. The plaintiff, therefore, is entitled to judgment.

Judgment for the plaintiff (*a*).

(*a*) Where, since the new rules of pleading, (H. 4 *W.* 4, 3 Nev. & Man. 1,) want of consideration is pleaded to an action against an acceptor, and the plaintiff replies that the defendant had a consideration, which is set out, and *concludes to the country*, and the defendant joins issue upon the replication, the plaintiff is not bound to shew consideration in the first instance. *Low* v. *Burrows*, 4 Nev. & Mann. 366; 2 Adol. & Ell. 483. And see *Graham* v. *Pitman*, 5 Nev. & Mann. 38; 3 Adol. & Ell. 521; *Bramah* v. *Roberts*, 1 Bingh. N. C. 469; *Trinder* v. *Smedley*, 3 Adol. & Ell. 522; *Richards* v. *Thomas*, 1 Cromp. Mees. & Rosc. 772; *Percival* v. *Frampton*, 2 C. M. & R. 180; *Simpson* v. *Clarke*, ibid. 342.

DOE on the demise of JOHN GRUBB *v.* EDWARD GRUBB.

In 1790, *E. G.*, being seised in fee of an estate, died intestate, leaving two sons, *J. G.* and *E. G.* *W. C.* was then tenant in possession, and so continued until the trial of this ejectment. In 1812 *J. G.* died intestate, leaving an only son and heir, *J. G.*, the lessor of the plaintiff. After the death of *E. G.* the purchaser, *W. C.* paid his rent to *E. G.* the younger son, and to his two sons *J. G.* and *E. G.* the defendant, in succession, up to the time of action brought, with this exception, that in 1804 *J. G.*, the eldest son of the purchaser, demanded and received from *W C.* one half year's rent. In 1805 the same *J. G.* cut down and disposed of, for his own benefit, certain timber upon the estate. In June 1813, *J. G.*, the lessor of the plaintiff, demanded from *W. C.* the rent then in arrear, to which *W. C.* replied, that his connection as a tenant with *J. G.* had ceased for several years. This ejectment was commenced in 1820, and the demise was laid on the 1st of May, 1813. Held, first, that there was no adverse possession to bar the right of the lessor of the plaintiff to recover in ejectment; and secondly, that the reply of *W. C.* in June 1813 was sufficient evidence of a prior disclaimer to support the demise in May, 1813, without proof of any notice to quit.

EJECTMENT for an estate called Little Horsenden, in the parish of Horsenden, in the county of Buckingham.

At the trial before *Garrow*, B., at the Buckinghamshire spring assizes, 1828, a verdict was found for the plaintiff, with one shilling damages, subject to the opinion of this Court upon the following case:—

Edward Grubb the elder, now deceased, purchased the estate in question in the year 1788, and the same was duly conveyed to him and his heirs by indentures of lease and release, dated 30th and 31st January, 1768.

The said *Edward Grubb* the elder died seised of the estate in question, intestate, 30th October, 1790, leaving two sons, *John*, the father of the lessor of the plaintiff, and *Edward*, the father of the defendant, him surviving. *John Grubb*, the eldest son of the purchaser, died 1st September, 1812, leaving the lessor of the plaintiff his only son and heir at law. *Edward Grubb*, the second son of the purchaser, died in July, 1817, leaving two sons, *John*, and *Edward* the present defendant; and *John*, the defendant's elder brother, died in July, 1825, having devised all his real estates to his brother *Edward*, the defendant. At the time of the purchase in 1788, one *William Cowdery* was tenant in possession of the estate, and so continued until the time of the trial of this ejectment. From the death of the first purchaser, with the exception hereinafter mentioned, the said *William Cowdery* paid his rent for the premises to *Edward Grubb*, the father of the present defendant, until his death in July, 1817; from that time to *John Grubb*, the defendant's elder brother, until his death in July, 1825; and from that period, till the time of the trial, to the defendant. The acts upon which the lessor of the plaintiff relied as acts of ownership, in support of his claim, were exercised by *John Grubb*, the eldest son of the first purchaser, as follows; viz., by demanding and receiving by his agent from *William Cowdery*, the tenant, about the end of 1804, half a year's rent, from which the land-tax was deducted; and by cutting down timber, chiefly fire-wood, on the estate in question, mostly round the hedges, which timber was marked at the end of 1804, and felled in the beginning of 1805. It appeared that at the same time the said *John*

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Grubb wanted to raise a sum of money, for which purpose a general fall of timber was made upon his other estates, as well as upon the estate in question. He himself accompanied the surveyors employed to mark the timber intended to be cut down, and the same, including that taken from the estate in question, was afterwards sold by auction. About the same time, by order of the said *John Grubb*, a valuation was made of his property, in which the estate in question was included. After the death of the said *John Grubb*, the father of the lessor of the plaintiff, Mr. *Tindal*, as agent of the lessor of the plaintiff, addressed and sent a letter to *William Cowdery*, the tenant, of which the following is a copy:—

"Aylesbury, June 18, 1813.

"Sir,—As Captain *Grubb* has employed me to collect all moneys due to his late father, I have to request that you will call on me and pay the arrears of rent due to the late Mr. *Grubb*, and that you will at the same time bring with you the last receipt for rent.

(Signed) *Thomas Tindal.*

(Addressed) "Mr. *William Cowdery*, Little Horsenden."

In answer to which, Mr. *Tindal* received a letter, of which the following is a copy:—

"Bledlow, June 26, 1813.

"Sir,—In consequence of having received a letter from you as yesterday respecting the rent of Little Horsenden estate, by the desire of my father I have to inform you, that his connection as a tenant with the late *John Grubb*, Esq. has ceased for several years, and that he now pays his rent to his brother.

(Signed) *William Cowdery*, junior.

(Addressed) "*T. Tindal*, Esq. Aylesbury, Bucks."

This letter was signed by the son of the said *William Cowdery*, the tenant, who wrote, signed, and sent it to Mr.

Tindal, by the direction and under the authority of his father. In 1814, the present lessor of the plaintiff commenced an action of ejectment, for the recovery of the premises in question. The declaration in that action, with the usual notice to the tenant to appear and plead, was served upon *William Cowdery*, the tenant in possession, who did not appear thereto; but *Edward Grubb*, the father of the present defendant, as landlord, entered into the common consent rule, and pleaded the general issue.

In this action, which was sent down for trial at the spring assizes, 1814, the record was withdrawn. In January, 1820, the lessor of the plaintiff served a new declaration in ejectment upon the said *William Cowdery*, the tenant in possession, with the usual notice to appear and plead, the demise being laid on 1st May, 1813, in the name of the present lessor of the plaintiff. The notice at the foot of the declaration required the tenant in possession to appear in the then next Hilary term. To this declaration the tenant in possession did not appear, whereupon a rule for judgment against the casual ejector was obtained, but *John Grubb*, the elder brother of the present defendant, appeared as landlord, entered into the common consent rule, and pleaded the general issue. The proceedings in this ejectment were delayed in consequence of a suit in equity, and in 1825, the then defendant *John*, the elder brother of *Edward*, the present defendant, died abroad, on which, under a rule obtained in the last-mentioned action, *Edward*, the devisee of his brother *John*, appeared as landlord, entered into the common consent rule, and pleaded the general issue, and was made defendant in the place of his brother, whereupon issue was joined; and by an order of *Holroyd*, J., dated 28th February, 1828, it was ordered that the said issue should be entitled as of Hilary Term, 1820, and that an imparlance should be entered up to the time of the plea of the said now *Edward Grubb;* whereupon the said last-mentioned issue was amended accordingly, and carried down for trial.

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At the trial before *Garrow*, B., evidence was given, on the part of the lessor of the plaintiff, of the above-mentioned acts of ownership, and of the sending of the letter above set forth to *William Cowdery*, and of the answer thereto. On the part of the defendant, it was objected, that by the demand and receipt of rent in 1804, *John Grubb*, the father of the lessor of the plaintiff, had acknowledged *William Cowdery* to be his tenant, and that such tenancy not having been determined by any notice to quit, an ejectment could not be maintained on the demise laid in the declaration; and, further, that the lessor of the plaintiff was barred from bringing any ejectment in this case, for that his ancestor, the eldest son of the purchaser, had not made a sufficient entry within the time prescribed by the statute of limitations. The learned judge reserved these questions, and left the case to the jury upon the evidence on both sides. If the jury thought there was an adverse possession on the part of the defendant's ancestor which defeated the present lessor of the plaintiff of his title, then to find for the defendant; if not, for the plaintiff. The jury found a verdict for the plaintiff.

The case was now argued by

Taunton, for the lessor of the plaintiff. First, there was a sufficient entry by *John Grubb*, the father of the lessor of the plaintiff, to take the case out of the statute of limitations, and to prevent the defendant from setting that up as a bar to the action. *John Grubb*, the purchaser of the estate, and the grandfather of the lessor of the plaintiff, died in 1790; upon his death, the estate descended to *John Grubb*, the father of the lessor of the plaintiff; and it is to be contended on the other side, that between 1790 and 1810 there was no sufficient entry by him. Now, in the first place, it appears upon the special case that the question of adverse possession was left to the jury; and it was properly so left, for it is a question of fact; *Doe* dem.

Thompson v. *Clark* (*a*); therefore the Court will not disturb their finding. But in the second place, admitting that this question is not concluded by the finding of the jury, but is now open to discussion, there still appears upon the special case enough to shew that *John Grubb*, the father of the lessor of the plaintiff, died seised of the estate; for it is stated, that in 1804 he claimed and received a half-year's rent, which was an acknowledgment of his title by the tenant, and that in 1805 he cut down timber, which was a clear and unequivocal act of ownership by himself. Secondly, no notice to quit was necessary. To this objection, as to the former, there are two answers. First, the defendant is not entitled to insist upon the necessity of a notice to quit, because he defends as landlord, that is, as landlord of the tenant in possession, and he cannot say that the lessor of the plaintiff was bound to give notice to quit to his, the defendant's tenant. Secondly, if *Cowdery* had defended as tenant, he could not have insisted upon the necessity of a notice to quit, because he, in 1813, disclaimed holding under the lessor of the plaintiff, and the authorities are express to shew that when the tenant does any act which amounts to a disavowal of the title of the lessor, no notice to quit is necessary; *Doe* dem. *Calvert* v. *Frowd* (*b*). It may, perhaps, be urged, that as the letter from *Cowdery*, relied upon as a disclaimer, was dated in June, 1813, and the day of the demise in the declaration is laid earlier, namely, in May, 1813, the disclaimer is too late to support this action; but it will be observed, that the letter states that *Cowdery*'s connection as tenant with the lessor's family had ceased for several years, thus carry-

(*a*) 8 B. & C. 717. And see *Doe* dem. *Jackson* v. *Wilkinson*, 5 D. & R. 273; 3 B. & C. 413.

(*b*) 4 Bingh. 557; 1 M. & P. 480. And see *Doe* dem. *Williams* v. *Pasquali*, Peake's N. P. C. 196; *Doe* dem. *Jefferies* v. *Whittick*, Gow's N. P. C. 195; *Doe* dem. *Clun* v. *Clark*, Peake's Add. Cas. 239. See also *Rogers* v. *Pitcher*, 6 Taunt. 202; 1 Marsh. 541; and *Doe* dem. *Dillon* v. *Parker*, Gow's N. P. C. 180.

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ing the disclaimer back to a period long antecedent to the day of the demise.

Follett, contrà. The finding of the jury respecting an adverse possession cannot be regarded as conclusive upon the defendant, because it appears that the learned judge had reserved that point for the opinion of the Court, as matter of law, before he submitted that, or any other point in the case, to the consideration of the jury, as matter of fact. The question, therefore, whether the ancestor of the lessor of the plaintiff ever made a sufficient entry to prevent the operation of the statute of limitations, still remains open; and it is submitted that he never did. The case of *Doe* dem. *Thompson* v. *Clark* (*a*) has no bearing upon the present, because the question there was, not whether a sufficient entry had been made, but whether the relation of landlord and tenant had always existed: here the question is, whether the father of the lessor of the plaintiff made a sufficient entry between the years 1790 and 1810. It is said that the demand and receipt of rent in 1804, and the cutting of timber in 1805, amounted to an entry. The first is clearly not sufficient, because it does not appear in what character that rent was paid and received by the two parties. The second, even if it constituted an entry, is still not sufficient, because it was not followed up by any ulterior proceeding. Now by statute 21 *Jac.* 1, c. 16, s. 1, no person shall make any entry into lands but within twenty years next after his right or title which shall first descend or accrue to the same; and by statute 4 & 5 *Ann.* c. 16, s. 16, no entry shall be sufficient within the former statute, unless upon such entry an action shall be commenced within one year next after the making such entry, and prosecuted with effect. [*Bayley*, J. The acts done in this case were not a mere entry, but taking part of the profits.] Still, as the party making the

(*a*) 8 B. & C. 717.

entry did not continue in possession, he ought to have followed up his claim by an action. Secondly, supposing the possession not to have been adverse, and that a tenancy subsisted, there ought to have been a notice to determine that tenancy before ejectment was brought. It was part of the case made by the lessor of the plaintiff, that *Cowdery* was his tenant: without that he clearly could not have recovered; and *Cowdery*'s tenancy never was determined. It may be admitted that the letter from *Cowdery* was a disclaimer, but that will not assist the plaintiff's case. The plaintiff is bound to make out a clear title subsisting on the day of the demise laid in his declaration. Now the day of the demise was in May, 1813, and the letter was written in the following June; therefore it operated as a disclaimer only from a time subsequent to the demise, for a disclaimer cannot operate by relation back to a time already gone by.

Taunton, in reply. Was there ever an adverse possession for twenty years? That is the real question in this case. It is clear that there never was. When *Edward Grubb*, the purchaser of the estate, and to whom *Cowdery* was tenant, died, the reversion passed to *John Grubb*, the father of the lessor of the plaintiff, as heir at law. If the younger brother had then entered, which, however, he did not do, even that would not have been an adverse possession; for "where a person dies seised in fee, leaving two sons, if the younger brother enters he does not enter to get a possession distinct from that of the elder brother, but to preserve the possessions of the father in his family." (*a*) On the other hand, the acts done by *John Grubb*, the elder brother, in receiving rent and cutting timber, were sufficient to constitute a possessio fratris, or a seisin to support a fine. Then the possession of *Cowdery* was the possession of *John Grubb* and of the lessor of the plaintiff until the disclaimer; and though the letter declaring the dis-

(*a*) Gilb. Ten. 28.

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claimer could not, strictly speaking, operate by relation back, still it was evidence of a prior disclaimer, and supported the action.

Follett. The entry by the younger brother, mentioned by *Gilbert*, C. B., is meant to refer to the case where there is a possession vacant on the death of the ancestor. In this case the possession never was vacant, for, there being always a continuing tenancy, the elder brother became seised immediately on the death of the father. But there was a subsequent attornment by the tenant to the younger brother, the effect of which was to disseise the elder brother, and to create a possession adverse to him. *Co. Litt.* 242; *Litt.* ss. 396, 397.

Lord TENTERDEN, C. J.—I am of opinion that the lessor of the plaintiff is entitled to recover. The acts done by the different parties between the period of the ancestor's decease and the year 1804, were all of an equivocal nature. The receipt of rent by the younger son, may have been on behalf of his elder brother, or may have been on his own behalf, claiming adversely. But in 1804, there were acts done of a decisive and unequivocal character, for in that year the elder brother demanded and received rent from the tenant, and not only made an entry upon the land, but was allowed to mark and cut down trees, which he afterwards sold for his own benefit. These were acts done by a person claiming to be landlord, and the submission to them by the tenant was an acknowledgment on his part of the title of the claimant. Then, if the elder brother was landlord in the year 1804, what has there occurred since to alter his character, or to devest his estate? The defence to the present action is made by a person claiming under the younger brother, and as landlord. In that character it is clear that he has no title. Then he claims a right to defend under *Cowdery*, the tenant. In setting up that defence the defendant adopts the acts of *Cowdery* as his own, and whatever would be evidence against *Cow-*

dery, is evidence against the defendant. Against *Cowdery* there is his own letter of June, 1813, in which he does not say that he never was connected with *John Grubb* as his tenant, but that the connection between them had ceased for several years. If so, it must have ceased before May, 1813, the date of the demise, and then that disclaimer is sufficient to entitle the lessor of the plaintiff to recover.

BAYLEY, J.—I entirely concur with my lord in the view that he has taken of this case. When *Edward Grubb*, the purchaser, died in 1790, *Cowdery* was in possession of the estate, which then descended to *John Grubb*, the father of the lessor of the plaintiff. From that time *John Grubb* was entitled to the rents, but for many years he did not receive them; they were paid to *Edward Grubb*, his younger brother. In what character *Edward* received them—whether as agent, or for his own use, either adversely to or by permission of *John*—did not appear. In the absence of evidence upon the subject, are we bound in point of law to say that such receipt of rent was adverse? I think not. Was there any evidence to that effect? There was none. Then in 1804, *John* demanded and received half a year's rent from *Cowdery* the tenant, the legal effect of which would be to remit him to his original right, and to make *Cowdery* become his tenant again, if he had previously renounced him as landlord. No complaint was made by *Edward* of that payment of rent to *John*, and his acquiescence in such an act may fairly be regarded as evidence of an acknowledgment by him that his previous receipts of rent were by the permission or as agent of *John*. Then the cutting down and disposing of the timber by *John* in 1805, was a clear act of ownership by him, which, coupled with the previous demand and receipt of rent, entirely removed the case out of the operation of the statute of *Anne*, which applies only where there is a naked entry or claim, without any receipt of the rents and profits. With respect to the other point, I think it clear that *Cowdery*'s

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letter of June, 1813, was not only a disclaimer then, but evidence of a previous disclaimer, as, in an action of trover, a present refusal to deliver is evidence of a previous conversion; *Morris* v. *Pugh* (*a*).

LITTLEDALE, J., concurred.

PARKE, J., having been of counsel in the cause, gave no opinion.

Postea to the plaintiff.

(*a*) 3 Burr. 1242.

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The office of crier and bellman for a city is a public annual office within the meaning of the statute 3 & 4 *W. & M.* c. 11, s. 6, execution of which for a year, with forty days' residence within the city, will confer a settlement; and if the city contains several parishes, the party executing the office will be settled in that parish in which he has resided during the last forty days of his execution of the office.

TWO justices, by their order, removed *Sophia Hall*, widow, and her six children, from the parish of St. Peter to the parish of St. Nicholas, both in the county of Hereford; which order the sessions on appeal confirmed, subject to the opinion of this Court upon the following case:—

Thomas Hall, deceased, the husband of *Sophia Hall*, the pauper, gained a legal settlement in the parish of St. Nicholas, Hereford, by renting a tenement. He quitted that house on the 23rd of November, 1827, and lived in the parish of All Saints, Hereford, till the 23rd of June, 1828, when he removed to St. Peter, Hereford, and resided in that parish till the time of his death, the 29th of December, 1828. On Monday the 2nd of October, 1826, he was appointed by the corporation of Hereford to the annual public office of town crier and bellman for the city of Hereford, and was also sworn in a constable of the city of Hereford. He was re-appointed and re-sworn on the 1st of October, 1827, and the 16th of October, 1828, and he executed the office of town crier and bellman in the city of Hereford, of which the parish of St. Peter forms a part,

from the time of his first appointment on the 2nd of October, 1826, up to the time of his death, on the 29th of December, 1828. He was also liable and ready to execute the office of constable, when called on, but never had acted as constable. There were other persons sworn in as constables, who acted as such in the city. *Thomas Hall* resided forty days and upwards, namely, from the 23rd of June, 1828, to the 29th of December, 1828, in the parish of St. Peter, Hereford. The question for the opinion of this Court was, whether the residence of *Thomas Hall* in St. Peter's parish, for forty days and upwards, while executing the annual public office of crier and bellman in all the parishes in the city of Hereford, namely, from the 23rd of June, 1828, to the 29th of December, 1828, was sufficient to gain a settlement. If it be, his widow, *Sophia Hall*, and family, have gained a settlement in St. Peter's parish; but if that residence be not sufficient, their settlement is in the parish of St. Nicholas.

Justice, in support of the order of sessions. No settlement was acquired in the parish of St. Peter, by executing the office, for two reasons; first, because the party did not reside a whole year in that parish while executing the office; and, secondly, because his residence there commenced after he had entered upon the office. Mr. *Nolan*, in his observations upon this head of settlement, states that it has never been decided whether a residence for forty days in a parish in which an office is executed is sufficient to confer a settlement, or whether the party must reside during the whole year; and he seems to doubt whether the appointment to the office should or should not be prior to the party's coming to reside in the parish (*a*). It is submitted that this species of settlement cannot be acquired unless the service of the office and the residence in the parish have been contemporaneous and co-extensive; that

(*a*) 1 Nolan, 629.

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the service and residence must begin and end together; that both of them must be not only for one whole year, but for one and the same whole year. The words of the statute originating this kind of settlement(*a*), are, "If any person who shall come to inhabit in any town or parish shall, for himself, and on his own account, execute any public annual office or charge in the said town or parish during one whole year, or shall be charged with and pay his share towards the public taxes or levies of the said town or parish, then he shall be adjudged and deemed to have a legal settlement in the same." The plain import of those words is, that the person claiming the settlement must come to inhabit in the parish before he enters upon the office; that he must execute the office during one whole year; and that he must continue to inhabit in the same parish during *the same* one whole year. This is the construction which has been given to that part of the statute which creates the settlement by payment of rates, with respect to which it was held, that a person residing in one parish of the city of Norwich, and being rated in another, did not acquire a settlement in either; *Rex* v. *St. Michael at Thorn, Norwich* (*b*). Why should a different construction be put upon the preceding branch of the same section? But, at all events, the residence in the parish must be co-extensive with the service of the office, if not concurrent with it. A year's service is expressly required, and so, impliedly, is a year's residence; for the words, "during one whole year," over-ride the whole section. *Rex* v. *Liverpool*(*c*) may perhaps be cited on the other side, where it was held, that if a church-yard lie in two parishes, the sexton may gain a settlement in the one in which he resides, although no part of the church lie within that parish. But that decision does not militate against the present argument, because there was in that

(*a*) 3 & 4 *W. & M.* c. 11, s. 6.
(*b*) 6 T. R. 536.
(*c*) 3 T. R. 118.

case a year's residence in the parish. The requisites of the statute must be strictly complied with, *Rex* v. *Holy Cross, Westgate*(*a*), where it was held, that a pauper who had been irregularly dismissed from his office gained no settlement. It may be matter of surprise that in the many cases which have come before the Court respecting settlements by serving an office, this question has never yet been discussed and decided; but the circumstance may perhaps be accounted for upon the inference, to which certainly it strongly tends, that it has hitherto been universally considered, that in order to constitute this species of settlement, the service and residence must be co-extensive and concurrent.

Campbell and *M^c^Lean*, contrà. The pauper acquired a settlement in St Peter's, for he did all that the law required of him for that purpose. He was duly appointed in October, 1827, to an office, the duties of which were to be discharged in a district including the parish of St. Peter's; he executed that office for one whole year, and he resided in that parish forty days, part of that year; and the law requires no more. A very brief review of the statutes bearing upon the subject will make this clear beyond all doubt. By the 13 & 14 *Car.* 2, c. 12, any person coming to settle in a parish, and being likely to be chargeable thereto, might be removed within forty days. But such person residing there forty days without being removed, thereby gained a settlement. Then the 1 *Jac.* 2, c. 17, s. 3, enacts, "that the forty days' continuance of such person in a parish, intended by the said act(*b*) to make a settlement, shall be accounted from the time of his or her delivery of notice in writing (which they are hereby required to do) of the house of his or her abode, and the number of his or her family, if he or she have any, to one of the churchwardens or overseers of the poor of the said parish, to which they shall so

(*a*) 4 Barn. & Ald. 618. (*b*) 13 & 14 *Car.* 2, c. 12.

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remove." Then the 3 *W. & M.* c. 11, after enacting, by s. 3, that such forty days' continuance shall be accounted from the publication in the church of the notice, introduces, by s. 6, an exception to the operation of the preceding statutes; for by that section it enacts, "that if any person who shall come to inhabit in any town or parish, shall, for himself, and on his own account, execute any public annual office or charge in the said town or parish, during one whole year, or shall be charged with and pay his share towards the public taxes or levies of the said town or parish, then he shall be adjudged and deemed to have a legal settlement in the same, though no such notice in writing be delivered and published, as is hereby before required." By that enactment the legislature substituted the execution during a year of an office for the notice which was previously required to confer a settlement upon a person coming to settle in a parish. Now, in such a case, it is clear that a person coming to settle upon a tenement of the requisite value, would have gained a settlement by residing forty days after publication of the notice. Then s. 7 enacts, "that if any unmarried person, not having child or children, shall be lawfully hired into any parish or town for one year, such service shall be adjudged and deemed a good settlement therein; though no such notice in writing be delivered and published as is hereinbefore required." By that enactment the legislature substituted the hiring and service for the notice in writing, and a party gained a settlement in a parish by residing forty days, provided there was a hiring for a year; *Brightwell* v. *Westhalley*(*a*). It is true that the 8 & 9 *W.* 3, c. 30, s. 4, reciting that doubts have arisen touching the settlement of unmarried persons not having child or children, lawfully hired into any parish or town for one year, enacts, "that no such person, so hired as aforesaid, shall be adjudged or deemed to have a good settlement in any such parish or

(*a*) 2 Bott, 251.

town, unless such person shall continue and abide in the same service during the space of one whole year;" but even since the passing of that statute, where there has been a hiring for a year, and service for a year in several different parishes, the party has always been held to be settled in that parish where he resided the last forty days. Upon the same principle the pauper in this case having executed a public annual office for a year in several different parishes, must be held to be settled in that parish where he resided the last forty days of that year, namely, in the parish of St. Peter's. It is not necessary in this case that the appointment to the office should be subsequent to the coming to inhabit in the parish; as it is not necessary, in the case of a hiring and service, that the hiring should be subsequent to the coming to inhabit in the parish: the same principle applies equally to both cases.

The case was argued on a former day in this term, when the Court took time for consideration. Judgment was now delivered by

Lord TENTERDEN, C. J., who, after recapitulating the facts of the case, thus proceeded:—Upon these facts the sessions were of opinion that the pauper's husband did not acquire a settlement in the parish of St. Peter's, Hereford; we are of a different opinion—we think he did. The question turns upon the statute 3 & 4 *W. & M.* c. 11, s. 6, which enacts, "that if any person, who shall come to inhabit in any town or parish, shall, for himself and on his own account, execute any public annual office or charge in the said town or parish, during one whole year, then he shall be adjudged and deemed to have a legal settlement in the same, though no such notice in writing be delivered and published, as is hereby before required." Now the office of crier is undoubtedly a public annual office, within the meaning of the statute; it is not necessary that it should be confined to one particular parish: an office in a city con-

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taining several parishes will clearly confer a settlement. By the statute 13 & 14 *Car.* 2, c. 12, a party coming to settle in a parish gained a settlement by forty days' residence. By the statute 1 *Jac.* 2, c. 17, s. 3, the forty days' continuance in the parish intended by the former statute to make a settlement, was to be accounted from the delivery of a notice in writing of the house of abode, &c., to the churchwarden or overseer of the poor. The effect of that statute, therefore, was, to prevent a party from gaining a settlement until he had resided forty days after the delivery to the parish officers of the notice thereby required. Then the statute 3 & 4 *W. & M.* c. 11, after enacting, by s. 3, that the forty days' continuance in the parish should be accounted from the publication in the church of the notice in writing required to be delivered to the parish officers, substituted, by s. 6, the executing of a public annual office for the notice required in the case of coming to settle upon a tenement; and as in that case a party would be settled in a parish by residing there forty days after the publication of the notice, so, by analogy, he will gain a settlement by the execution for a year of a public annual office in any parish where he has resided for forty days. Here the pauper's husband did execute a public annual office in the parish during one whole year. He comes, therefore, within the very words of the statute, and it is a safe rule of construction to adhere to the words of a statute. But the seventh section of the same statute throws some further light upon this subject. It enacts, that if any unmarried person, not having child or children, shall be lawfully hired into any parish or town, for one year, such service shall be deemed a good settlement therein, though no notice in writing be delivered or published. Now, although the subsequent statute, 8 & 9 *W.* 3, c. 30, s. 4, requires that there shall be a service for a year as well as a hiring for a year, still it is clear that a party will gain a settlement by a year's service under a yearly hiring in that parish in which he has resided for the

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last forty days; and it is immaterial in that case whether the party be hired before or after he comes into the parish. Again, therefore, by analogy, in this instance to the case of hiring and service, as in the former to the case of coming to settle upon a tenement, it seems to us that the pauper's husband having been appointed to his office before he came to reside in the parish of St. Peter's; having executed that office for one whole year for that as well as the other parishes in the city of Hereford; and having resided in that parish for the last forty days of his execution of the office, gained a settlement in that parish, namely, the parish of St. Peter's, Hereford. That being our opinion, it follows that the order of sessions must be quashed.

Order of Sessions quashed.

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A pauper hired himself for a year, at 5*l.* wages, and 5*s.* earnest, to his aunt, who occupied six acres of land, and kept two cows; when his aunt had no work for him, he was to work for any body else for his own benefit: this is not a hiring for a year, but an exceptive hiring, and service under it confers no settlement.

UPON appeal against an order of two justices, for removing *Richard Robinson* and his wife and family from the parish of South Killingholme to the parish of Elsham, both in the parts of Lindsey and county of Lincoln, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The respondents proved a primâ facie case of settlement in the appellant parish of Elsham. The appellants then proved that the pauper, in 1823, being unmarried, and without child, hired himself for a year, at 5*l.* wages, and 5*s.* earnest, to his aunt, who resided in a third parish, North Killingholme, and occupied six acres of land and kept two cows there: when his aunt had no work for him, he was to work for any body else for his own benefit. The pauper entered the service, resided, and worked with his aunt during the whole year, except that in harvest time he worked for a fortnight with another person at 2*s.* a day, which he received for his own benefit, sleeping every night

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at his aunt's, and doing all the work she had for him to do every morning before he went to work, and generally in the evening when he returned, unless it was too late. He received his wages at the expiration of the year. The next year he was hired to another master at 9*l.* wages.

N. R. Clarke and *Whitehurst*, in support of the order of sessions. In *Rex* v. *Chertsey* (*a*), the pauper went to live with her father to do the offices of a servant for a year, for which she was to have her board and lodging, and such profit as she could make by keeping fowls, and what she could earn by her own labour; and if that did not produce as much as she got in her former place, her father was to make up the difference; and that was held to be a good hiring for a year, service under which conferred a settlement. That case is expressly in point with the present; and it has never been overruled. Indeed the facts of this case are stronger in favour of the settlement than were those of the case referred to. The parties there clearly contemplated from the first that there would be intervals in the course of the year during which the father would not require the services of the daughter, for he expressly limited the wages he was to give her to such an amount as, in addition to her own earnings, would be equivalent to her wages in her former place. Here the wages agreed for were fixed and certain, and the aunt might have insisted upon the pauper's serving her during the whole of every day in the year, for it was only when his aunt had no work for him that he was to work for any body else for his own benefit. If, while he was so working for somebody else, any thing had occurred upon his aunt's farm which required his attendance, he could not have withheld it. The aunt's title to his service was paramount to that of every other person; and the case finds that in fact he did serve her during the whole year, which must mean every day in the year, except one fortnight when he harvested for another person, and that

(*a*) 2 T. R. 37.

during that fortnight he did all the work which his aunt had for him to do, either in the morning before he went out, or in the evening after he returned home. The cases that will probably be cited on the other side are all materially distinguishable from the present. In *Rex* v. *Edgmond* (*a*), which was relied on at the sessions, the hiring was at weekly wages, and "the agreement," as *Abbott*, C. J. observed, "contained in substance an engagement to work only during certain hours of the day." That case, therefore, can have no bearing upon the present. In *Rex* v. *Polesworth* (*b*), the agreement was to serve for three years, at one shilling per day when the master had work to do, and when he had no work the servant not to be paid. There the wages were daily, and were to be paid only when the servant worked. Here the wages were yearly, and were to be paid whether the servant worked or not. There the master told the servant expressly, at the time of the hiring, that he should not have work for him all the year round, particularly in the winter, and that when he had not work for him, he might get work from other people. Here the aunt merely consented, as matter of indulgence, that if it should happen that she had no work for the pauper, he might work for other persons. There the ground of the decision was, as stated by *Abbott*, C. J., that the master had the control over the servant only so long as there was work for him; as soon as there was no work, the servant ceased to be under the control of the master, and was at liberty to get work elsewhere. Here the control of the aunt over the pauper never ceased; she retained it during the whole year, and throughout every day in the year, though she might, if she chose, occasionally dispense with his services. In *Rex* v. *Lydd* (*c*), the pauper was hired for three years at 20*l.* a year, in the capacity of a looker, his master expressly telling him, at the time the contract was entered into, that he did

(*a*) 3 Barn. & Ald. 107.
(*b*) 4 D. & R. 258; 2 B. & C. 715; 2 D. & R. Mag. Ca. 202.
(*c*) 4 D. & R. 295; 2 B. & C. 754; 2 D. & R. Mag. Ca. 205.

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not think he should have full employment for him; he served three years, during which time he did other work for his master, who paid him for it extra by the job, and he also worked for another master as looker when his leisure suited. It was held that the pauper did not acquire a settlement, and upon the same principle already adverted to, for *Abbott*, C. J. said, "It is quite evident from the facts of the case, that Mr. *Fisher* (the original master) never stipulated for, and in point of fact never had the control over the pauper, or the right to his entire service, for one whole year." Upon the whole, therefore, it seems clear that the sessions were correct in thinking that the pauper in this case had acquired a settlement by hiring and service in the parish of North Killingholme.

Clinton and *Hildyard*, contrà. No settlement can be acquired in any case by a hiring and service, unless the contract between the parties is such as to give the master the absolute control over the servant during the entire period of service. This is a well-established rule of settlement law, the application of which to the present case at once shews that no settlement could be acquired by service under the hiring in question. The language of *Abbott*, C. J. in *Rex* v. *Lydd* (*a*), just referred to, is expressly suited to the present case, for the mistress here never stipulated for, and in point of fact never had, and, it may be added, by the very terms of the contract never could have, the control over the pauper, or the right to his entire service, for one whole year; the pauper was bound to serve her so long only as she had work for him. That case and *Rex* v. *Edgmond* (*b*), and *Rex* v. *Polesworth* (*c*), are all expressly in point. As to *Rex* v. *Chertsey* (*d*), the only case cited on the other side, it is to be observed that the principal question there discussed was, whether a child could acquire a

(*a*) 4 D. & R. 295; 2 B. & C. 754; 2 D. & R. Mag. Ca. 205.
(*b*) 3 Barn. & Ald. 107.
(*c*) 4 D. & R. 298; 2 B. & C. 715; 2 D. & R Mag. Ca. 202.
(*d*) 2 T. R. 37.

settlement by hiring and service with its parent. The decision in that case upon that point has been supported by subsequent cases, and so far it may be considered as law; but if upon other points that case militates against the more modern authorities, and especially those now relied on, it cannot be deemed, when opposed to them, of any weight. There is another view of the present case in which the settlement cannot possibly be supported; for according to the distinction drawn and the rule laid down in *Rex* v. *Byker* (*a*), which was very fully considered, the hiring here must clearly be regarded as an exceptive hiring.

Lord TENTERDEN, C. J.—There are decisions for and against settlements of this particular kind, which it is certainly not easy to distinguish from each other; but it appears to me upon the whole, that the present case comes nearer in its facts to *Rex* v. *Edgmond* (*b*), *Rex* v. *Polesworth* (*c*), and *Rex* v. *Lydd* (*d*), than to the earlier cases upon the same subject. Looking at all the terms of this contract, I cannot help thinking that the parties must have contemplated some portions of the year when the aunt would not have employment for the pauper. If that were so, the contract did not extend over the whole year, but over such parts of it only as she might have employment for the pauper, which was not a hiring for a year.

BAYLEY, J.—It seems to me that the fair meaning and effect of the contract in this case was, to limit the service of the party hired, to that portion of the year during which the party hiring might have occasion for it; and in that view of it, it is impossible to say that it amounted to a hiring for a year.

(*a*) 3 D. & R. 330; 2 B. & C. 114; 3 D. & R. Mag. Ca. 15.
(*b*) 3 Barn. & Ald. 107.
(*c*) 4 D. & R. 258; 2 B. & C. 715; 2 D. & R. Mag. Ca. 202.
(*d*) 4 D. & R. 295; 2 B. & C. 754; 2 D. & R. Mng. Ca. 205.

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LITTLEDALE, J. concurred.

PARKE, J.—If the meaning of the words used by these parties, when contracting, be taken to be, that the aunt, during any portion of the year when she did not need, or did not chuse to employ the pauper, might decline doing so, the contract of hiring was not for a year. Construing those words according to their natural import, I think that was their fair meaning, and that this was an exceptive hiring. *Rex* v. *Chertsey* (*a*), was decided upon a different ground. The pauper there was hired for a year, and was to "have her board and lodging, and such profits as she could make by keeping fowls, and what she could earn by her own labour;" and the latter words were considered by *Ashurst*, J. and *Grose*, J. to give her liberty to do such work on her own account as she could do consistently with the service which she was in the first instance bound to render to her master. I see nothing in that decision inconsistent with the present.

Order of Sessions quashed.

(*a*) 2 T. R. 37.

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A parish certificate, produced in an appeal, bore date in April, 1748, and purported to be signed by two churchwardens and two overseers. It appeared by the parish books, that in May, 1747, five overseers had been appointed, two of whom had signed the certificate. By an indenture of parish apprenticeship, dated in October, 1747, it appeared that the same five persons were at that time overseers, and that four persons were at the same time churchwardens, two of whom had signed the certificate; and by the parish books, in July, 1748, that five overseers were again appointed, and that four churchwardens had been regularly chosen from 1683 to 1829. By the visitation books for 1746, it appeared that four churchwardens were then sworn in; those for 1747 were lost; but by those for 1748 it appeared that in September in that year four churchwardens were again sworn in, but that in about a dozen instances between 1683 and 1829, less than four churchwardens had been sworn in. Held, that the sessions were not bound to presume, even for the purpose of giving effect to so ancient a document, either that there had been a new and valid appointment of overseers between October, 1747, and April, 1748, the date of the certificate; or that at that date less than four churchwardens were sworn in: and that they were, therefore, right in rejecting the certificate as invalid.

BY an order of two justices, *T. Woodman*, his wife and children, were removed from the parish of Upton Gray to

the parish of Bishop's Waltham, both in the county of Southampton. On appeal, the sessions quashed the order, subject to the opinion of this Court upon the following case:—

A certificate was produced by the respondents, from the parish chest of their parish, signed by two churchwardens and two overseers of the parish of Bishop's Waltham, dated the 16th April, 1748, by which it was acknowledged to the former parish, that *Peter Woodman*, the great grandfather of the pauper, was legally settled in the latter parish. The certificate had never been discharged, so far as it regards the pauper. On the part of the appellants it was proved, from the parish books of Bishop's Waltham, that on the 17th of May, 1747, five overseers were appointed by and for the said parish; their names were *Harris*, *Edwy*, *Vernon*, *Stares*, and *Cowdery*, of whom *Harris* and *Cowdery* signed the above certificate, dated the 16th of April, 1748. In an indenture of parish apprenticeship, dated the 24th of October, 1787, it was recited, that at that time the said five persons, namely, *Harris*, *Edwy*, *Vernon*, *Stares*, and *Cowdery*, were overseers, and that at the same time four persons, named *Homer*, *Barefoot*, *Hellyer*, and *Wateridge*, of whom *Homer* and *Wateridge* signed the above certificate, were churchwardens of the parish of Bishop's Waltham. It was also proved on the part of the appellants, from the parish books, that a church rate for the said parish, for the year 1747, was signed on the 8th of May, 1748, by four churchwardens, whose names were there stated to have been *Homer*, *Barefoot*, *Hellyer*, and *Wateridge*. It was also proved on the same part, from the same books, that on the 8th of July, 1748, five overseers were again appointed for the same parish, whose names were there stated to have been *Lacy*, *Parker*, *Troid*, *Edwy*, and *Suett*. It appeared also from the same parish books, that from the year 1633 to the year 1829, four churchwardens had been regularly chosen every year for the said

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parish. By the proper visitation books for 1746, it was proved that four churchwardens were sworn in for the parish of Bishop's Waltham, for the year ensuing the date of such swearing in. The visitation books for the year 1747 were lost. By the visitation books for 1748, it was proved, that on the 19th of September, 1748, four churchwardens were sworn in for the said parish, for the year ensuing that date. By the same books it appeared, that in twelve or thirteen different years, between the years 1633 and 1829, four churchwardens had not been sworn in for the said parish; but that in those instances less than four had been sworn in. It was contended on the part of the appellant parish, that, under the circumstances above stated, the certificate granted by the appellant parish was void, it having been signed by two out of five overseers, whose appointment as overseers was void as to all, inasmuch as by the statute 43 *Eliz.* c. 2, s. 1, not more than four overseers can be appointed, and on the ground that the majority of the parish officers had not signed it. On the part of the respondent parish it was contended, that after so long a period, being more than eighty years, any possible case by which the certificate might be supported ought to be presumed. Hence, as it might be presumed, either that a new and valid appointment of *Cowdery* and *Harris* as overseers had been made for the appellant parish in the interval between the 24th of October, 1747, when it is recited, as above, that there were five overseers, and the 19th of April, 1748, the date of the certificate; or that at that date there were not four churchwardens sworn in; in either of which cases the certificate would be signed by a majority of the parish officers: such presumption should now be made.

Selwyn and *Poulter*, in support of the order of sessions, were stopped by the Court, who desired to hear

Dampier and Sir *George Grey*, contrà. Every possible, or

at least every reasonable intendment ought to be made in favour of a document so ancient as the certificate in this case. Now it is possible, and does not seem unreasonable after a lapse of more than eighty years, to presume that there was a re-appointment of four overseers between the 24th of October, 1747, and the 19th of April, 1748, or that at the latter period two churchwardens only had been sworn in. *Rex* v. *Catesby* (*a*), and *Rex* v. *Whitchurch* (*b*), seem abundant authorities for making such a presumption under such circumstances. It is true, the presumption which is asked to be made in this case is one of fact and not of law; nevertheless it may be made, and therefore in such a case ought to have been made, even though the probabilities may be against the existence of the fact necessary to render the certificate valid. In *Hillary* v. *Waller* (*c*), where the question was whether a conveyance of a legal estate ought to be presumed, Sir *W. Grant*, M. R. said, that the ground upon which such presumption proceeded was, that what ought to have been done must be presumed to have been done; and that the presumption does not always proceed upon the belief that the fact presumed has actually occurred; for that grants are frequently presumed, as Lord *Mansfield* said in *Eldridge* v. *Knott* (*d*), merely for the purpose and upon the principle of quieting possession.

BAYLEY, J. (*e*)—This case appears to me too plain for argument. It is an attempt to carry the cases of *Rex* v. *Catesby* (*f*) and *Rex* v. *Whitchurch* (*g*) to an extent at once unreasonable and absurd. In the latter of those cases the certificate described four persons as churchwardens and

(*a*) 4 D. & R. 434; 2 B. & C. 614; 2 D. & R. Mag. Ca. 278.
(*b*) 1 M. & R. 472; 7 B. & C. 573; 1 M. & R. Mag. Ca. 167.
(*c*) 12 Vesey, jun. 252.
(*d*) Cowper, 215.
(*e*) Lord *Tenterden*, C. J., was sitting at nisi prius at Guildhall.
(*f*) 4 D. & R. 434; 2 B. & C. 814; 2 D. & R. Mag. Ca. 278.
(*g*) 1 M. & R. 472; 7 B. & C. 573; 1 M. & R. Mag. Ca. 167.

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overseers of the parish, but was signed by only three of them; by one *Piper*, as churchwarden, and by two others as overseers. It was proved by the visitation books, that in the year 1758 the two churchwardens were sworn in after the date of the certificate, and it was therefore contended that *Piper*, the party who had signed the certificate as churchwarden, was not at the time churchwarden de jure, and therefore that the certificate was not binding upon the parish. It was further proved, that from 1751 to 1758 no churchwardens were sworn in; but the parish who had granted the certificate had, from the year 1758, to the time when the order of removal was made, treated it as valid, for they had relieved the pauper while residing in another parish. The sessions having found in favour of the certificate, this Court held, that it might reasonably be presumed that *Piper*, after his nomination in 1758, and before he did any act as churchwarden, had gone to the commissary, and had been sworn into office before him; and, under the circumstances of that case, such a presumption was not unreasonable, for it was not inconsistent with any other fact. In *Rex* v. *Catesby* (*a*), the certificate, which by law should have been signed by a majority of the parish officers, purported to be signed by only one churchwarden and one overseer; therefore, if there were two churchwardens and two overseers in the parish, that certificate was bad. The sessions having presumed in favour of the certificate, it was referred to this Court to say whether there could be any state of facts that would make it a valid certificate, and they decided that it might be valid on two grounds. By custom there might have been only one churchwarden in the parish, and the sessions might have presumed that only one was appointed: or, they might have presumed, that two overseers were originally appointed, and that one of them had died before the certificate was granted. Either

(*a*) 4 D. & R. 434; 2 B. & C. 814; 2 D. & R. Mag. Ca. 278.

of these would have been a reasonable presumption under the circumstances of that case; but what is the state of facts here? Are they such that we must say the sessions were wrong in refusing to make the presumption which they were desired to make? I think clearly not. It is admitted that the presumption is one, not of law, but of fact, which in an ordinary case it would be for a jury to decide; but it is contended that a jury ought to make such a presumption, whether they believe the fact really to have existed or not: and a dictum of Sir *William Grant*, in *Hillary* v. *Waller* (*a*), to that effect has been cited. From that doctrine I, for one, ever did and ever shall dissent: I would never sanction either a court or a jury in presuming that which they really believe to be contrary to the fact. Here the fact which we are called upon to presume is not only highly improbable in itself, but is totally inconsistent with other facts which are proved to have existed about the same time. On the one ground, we are asked to presume, first, that the four churchwardens were not sworn in, which would be presuming that they acted in violation of their duty, when we ought rather to presume that they performed their duty; or, secondly, that one of them died,—a presumption which, if to be made at all, ought to have been made by the sessions, and not by us. But the other ground is still more unreasonable. It is said, that there was a bad appointment of overseers, and that, therefore, we ought to presume a new and valid appointment of overseers before the certificate was granted. Now it appears that in the very next year, a like bad appointment, namely, of five overseers, was again made; so that if we presume any thing, we must presume this—that the error in the number of overseers was discovered and corrected between October, 1747, and April, 1748, and yet that the old erroneous practice was again resorted to in October, 1748. I can

(*a*) 2 Ves. jun. 252.

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see nothing in this case which warrants the presumption of any fact necessary to give validity to this certificate, and I cannot say that the sessions ought to have drawn from the facts stated any of the conclusions, which it has been insisted they ought to have drawn. I am, therefore, of opinion that the order of sessions ought to be confirmed.

LITTLEDALE, J. concurred.

PARKE, J.—I am of the same opinion. The doctrine attributed to the Master of the Rolls in the case of *Hillary* v. *Waller*(*a*) may be correct as applied to the particular subject-matter which had there been discussed before him; but may be utterly inapplicable to the present and many other cases. A jury, probably, would be directed to presume, after a long lapse of years, the reconveyance by trustees of a legal estate, without any specific evidence of the execution of a deed of conveyance—provided there was no fact in the case tending to rebut such a presumption: but that would be a very different case from the present, and here there are facts which rebut the presumptions which we are asked to make.

Order of Sessions confirmed.

(*a*) 2 Ves. jun. 252.

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A notice of appeal against a county rate, under 55 *Geo.* 3, c. 51, s. 14, must either state in express terms that the appellant is aggrieved by the rate, or state that from which it follows of necessity that he is so.

Therefore, such a notice of appeal, stating, as the ground of appeal, "that the county rate is unequal and defective, inasmuch as the appellant parish is charged and assessed in the rate at a higher proportion of the pound sterling, according to the fair annual value of the

ON appeal by the churchwardens and overseers of the poor of the parish of Whitstone, in the county of Devon, against such parts of the county rate as affected that parish and the parish of Blackawton, the sessions ordered the rate to be amended, in the manner hereafter mentioned, subject to the opinion of this Court upon the following case:—

More than fourteen days before the entry of this appeal at the Epiphany sessions, a notice, of which the following is an extract, was served by the appellant parish upon the churchwardens and overseers of the poor of the respondent parish, upon the clerk of the peace for the county, and upon the hundred constables:—

"Take notice that we the undersigned, the churchwardens and overseers of the poor of the parish of Whitstone, within the hundred of Wanford, in the county of Devon, do intend to enter an appeal at the next general quarter sessions of the peace to be holden at the castle of Exeter, in and for the said county of Devon, against the rate for the said county; and that our objections to the said rate, and our reasons for appealing therefrom, are, that the said county rate is unequal and defective, inasmuch as our said parish of Whitstone is charged and assessed in the said rate at a higher proportion of the pound sterling, according to the fair annual value of the ratable property therein, than the respondent parish is charged and assessed in the rate, in proportion to the fair annual value of the ratable property therein," is defective and bad, for not going on to state in the words of the statute, "than has been fixed and declared by the justices of the county, in sessions assembled, as the basis of the rate;" for both parishes might have been valued too low, and yet the appellant parish might have no reason to complain with reference to the basis on which the whole rate was made.

And where, upon such defective notice, the sessions received evidence of the annual value of the ratable property in both parishes, and amended the rate by altering the assessment upon the two parishes according to the annual value so proved, but left the statement of the annual value of both to remain as before:—Held, that they had acted without authority, and that their order must be quashed.

Semble, that the sessions might have corrected an inequality in the valuation of the ratable property in the two parishes, if the notice of appeal had been so framed as to authorize them to receive evidence upon that subject.

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the said parish of Blackawton is charged and assessed in such rate, in proportion to the fair annual value of the ratable property in such parish."

More than fourteen days before the Easter sessions, a second notice, signed by the churchwardens and overseers of the poor of the appellant parish, was served upon the churchwardens and overseers of the poor of the parish of Blackawton, the clerk of the peace for the county, and the hundred constables. This notice recited the delivery of the former, and the entry of the appeal at the Epiphany sessions; it then recited, that at the said Epiphany sessions an application had been made to the Court to appoint certain persons to enter upon, go over, and survey the whole of the said parishes of Whitstone and Blackawton, for the purpose of ascertaining the fair annual value of the said parishes respectively, and of giving evidence thereof to the Court on the hearing of the said appeal, and that the Court refused to make such order, being of opinion that they had no authority so to do. The notice then proceeded as follows:—

"Now we the undersigned, the churchwardens and overseers of the poor of the parish of Whitstone aforesaid, do hereby give you this further notice, that we intend, at the next general quarter sessions of the peace, to be holden at the castle of Exeter, in and for the said county of Devon, to prosecute and try the said appeal against the said rate for the said county of Devon, upon the grounds and for the reasons set forth or mentioned in the hereinbefore recited or mentioned notice."

This notice then stated that the parish officers of Whitstone had appointed two surveyors (who were named) to survey the property in their parish, as well as in that of Blackawton, chargeable to the county rate, in order to prove, at the trial of the appeal, the fair annual value at which the parishes ought to be respectively charged in the said rate; and it required the parish officers and others of the latter parish to permit the said surveyors to survey their

premises for that purpose, and called upon them also to appoint surveyors on their part.

When these notices had been read, an objection was taken on the part of the respondent parish, that it did not appear upon the face of the notices that the appellant parish was aggrieved by the rate; but the Court over-ruled that objection, and directed the appellants to proceed. They proceeded accordingly, and tendered the rate in evidence, for the purpose of shewing the sums at which the contending parishes were respectively assessed. The title of the rate was as follows:—

"Devon new county rate of 943*l.* 14*s.* 8¾*d.*, being one farthing in the pound on the annual value of the county, amounting to 905,984*l.* 12*s.* 4½*d.*, as returned by the several parishes in the county, pursuant to the 55 *Geo.* 3, c. 51, settled and approved of at Epiphany sessions, 1827, and then ordered to be printed."

The assessment in respect of the said parish of Whitstone was 3*l.* 3*s.* 10*d.*, on an annual value of 3064*l.*; and in respect of that of Blackawton was 2*l.* 11*s.* 5*d.*, on an annual value of 2468*l.* The appellants then called as witnesses the two surveyors named in the second notice. They had accurately surveyed the appellant parish. The one valued the estates and ratable property within that parish at 3766*l.*, the other valued them at 3680*l.* per annum. With regard to the value of the estates in the respondent parish, one of these witnesses, in the years 1824 and 1825, had been employed to survey the greater part of that parish by two or three private individuals, with a view to the sale of some property therein; and he valued the whole parish at 6315*l.* per annum. The other witness had surveyed the parish as well as he could, by riding through the roads and lanes which intersected it, and he valued it at 6952*l.* per annum.

No evidence being offered on the part of the respondents, the Court took middle sums between those fixed by the two surveyors as the annual value of the respective parishes, and amended the rate by equalizing the assessments according to

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the proportions of the sums so taken (but leaving the annual value on the rate to stand as before), by reducing the sum assessed on Whitstone to 2*l.* 11*s.* 4*d.*, on an annual value of 306*l.*, and by raising the sum assessed on Blackawton to 3*l.* 13*s.* 11*d.*, on an annual value of 246*l.*

The questions for the opinion of the Court were, First, whether the notice of appeal was sufficient? Secondly, whether the Court of Quarter Sessions had any power to make the amendment above-mentioned in the rate, and whether they should not have required the fair annual value of the respective parishes to be returned to them in the mode prescribed by the statute 55 *Geo.* 3, c. 51?

Crowder and *Escott* in support of the order of sessions. The first objection raised in this case is, that the notice of appeal is insufficient for not alleging in express terms that the appellant parish is aggrieved by the rate. There is in reality no ground for this objection, though it will be endeavoured to be supported by two cases, *Rex* v. *Justices of Essex* (*a*) and *Rex* v. *Justices of West Riding of Yorkshire* (*b*), which, however, have no application to the present, for they were cases of appeals against orders for diverting and stopping up of roads, in which the statutes giving the right of appeal expressly required the appellant to state in his notice that he was aggrieved by the order appealed against (*c*). The clauses in the statutes giving the

(*a*) 7 D. & R. 658; 5 B. & C. 431; 3 D. & R. Mag. Ca. 483.

(*b*) 1 M. & R. 547; 7 B. & C. 678; 1 M. & R. Mag. Ca. 215.

(*c*) Which were, in the first case, the former public Highway Act, 55 *Geo.* 3, c. 8, s. 63; and in the second a local and personal act, 6 *Geo.* 4, c. 3, to which the provisions of the late public Highway Acts, 3 *Geo.* 4, c. 126, 4 *Geo.* 4, c. 95, and 5 *Geo.* 4, c. 69, were extended. It cannot exactly be said that the appeal clause in either case *expressly* required the appellant to state in his notice that he was a party injured and aggrieved; it confined the right of appeal to persons injured and aggrieved, and required them to give notice in writing, without specifying the contents of such notice: and the Court held that, under those circumstances, it was necessary for the appellant to describe himself in his notice as a party injured and aggrieved.

right of appeal in those cases differ from that which gives the right of appeal in this case in another respect also, for they do not require the appellant to set out in his notice the grounds and causes of his appeal, nor do they specify any particular grounds of appeal. But the appeal clause in the statute bearing upon the present case (*a*) does specify several grounds of appeal, and if the appellants have stated in their notice one of those, from which it must necessarily follow that they are parties aggrieved, though they have not in express terms alleged themselves to be so, it would seem, both upon principle and upon the authority of *Rex* v. *Justices of Somersetshire* (*b*), that they have done sufficient to satisfy the statute.

The second objection is, that the sessions had no power to make the amendment in the rate which they have made, altering the assessment, but leaving the statement of the annual value of the two parishes unaltered. The answer to this objection is, that all the clauses of the statute in which any reference is made to the annual value of the ratable property in the different parishes, relate to the power of the justices to make a new rate for the whole county, and not to the mode of their determining a question between two particular parishes in an appeal against particular portions of a rate. In a case of appeal, the office of the justices is really no more than this,—to ascertain the just amount of assessment upon the contending parishes, in proportion to the annual value of the property within the pa-

(*a*) 55 *Geo.* 3, c. 51, s. 14.

(*b*) 7 B. & C. 681, n. In that case "a notice of appeal against *overseers' accounts*, merely stating that the party intending to try his appeal against the accounts, on the grounds and for the reasons hereinafter set forth, and then specifying the items against which he intended to appeal, and the objection which he intended to make to each item, was held to be sufficient, although it was not stated that the party intending to appeal was a rated inhabitant of the parish or a party aggrieved." It is to be observed, that the case proceeded upon the stat. 17 *Geo.* 2, c. 38, s. 4, which, in the case of *overseers' accounts*, gave the right of appeal to any person *having any material objection* to the said accounts, upon giving reasonable notice.

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rishes, and to make the rate conformable thereto,—which is precisely what has been done in this case. It will be said on the other side, that where the question is, whether the assessments have been made upon a just estimate of the value of the two parishes, or not, the justices ought to require the churchwardens and overseers to furnish returns of the true value of their respective parishes, in the manner pointed out by the second section of the statute. It is difficult to imagine how such a proceeding could be productive of any beneficial result; for if an appeal were brought upon the express ground that the value originally returned by the churchwardens and overseers was an incorrect one, the calling for a new return would be referring back the same question to the same parties against whose determination upon it the appeal was brought. It would be useless, therefore, for the justices to call upon the respondents to make a new return of the value of the ratable property in their parish, and the appellants have no power to do so; therefore it would be impossible for them, and useless, as has already been shewn, if possible, to complain of the estimate of that value. It is the assessment on their parish by which the appellants are aggrieved, and their appeal, therefore, is properly made against that assessment.

Praed and *Kekewich*, contrà. No answer has been given to either of the objections arising in this case. First, the notice of appeal is clearly bad for not stating that the appellants are aggrieved. They may be able to point out some inequality in the rate, or some objection to it founded upon one of the grounds of appeal enumerated in the fourteenth section of the statute; but it does not therefore necessarily follow that they are aggrieved by that inequality, or by the existence of that ground of appeal. But the statute confines the right of appeal to such persons as have reason to think that they are, in other words such persons as are, aggrieved; therefore, upon the principle of the first two cases cited on the other side, it is incumbent upon the party

appealing, first, to state that he is, or has reason to think himself, aggrieved; and secondly, to shew the nature of that grievance. Now here, the appellants do not state that they *are* aggrieved, and the facts of the case shew that they are *not*. It appears that the annual value of the ratable property in the appellant parish is, according to the lowest estimate furnished by their own witnesses, 3680*l.* per annum. The assessment upon them assumes the annual value to be only 3064*l.*, and they are rated upon that value. Whatever, therefore, may be the assessments upon other parishes, they are not aggrieved, for they are under-rated; the assessment on them ought, in any view of the case, to be higher than it is.

Secondly, regard being had to the ground of appeal stated in the notice, the justices clearly had no power to make the alteration, improperly called amendment, in the rate which they did. The ground of appeal relied on is, that the appellant parish is rated at a higher proportion of the pound sterling, according to the annual value of their ratable property, than the respondent parish. Now the basis of the rate was one farthing in the pound upon the annual value of the several parishes in the county, and upon that scale these two parishes were assessed in regard of their annual value respectively, as returned upon oath to the sessions. There is therefore no inequality in the proportion of the pound sterling at which these parishes were assessed, and the appellants have failed in making out the ground of appeal stated in their notice: their ground of appeal should have been, that the value of the ratable property in the respondent parish was improperly estimated in the return, and was in fact higher than that upon which they were assessed: and then, if that ground of appeal had been made out, the justices should first have ascertained the real value by ordering a new return, as they are empowered to do by the second section of the statute, and then altered the assessment in conformity with the real value so ascertained. That and the other sections of the act which relate to the calling

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for and making of returns of the annual value, are not confined to the making of an entirely new rate, for they empower the justices to call for such returns from time to time, as often as they shall deem it expedient, and from *such and so many* parishes as they shall deem expedient; whereas, for the purpose of making an entirely new rate, they must have returns from *every* parish in the county: the object clearly was to give them the power to call for the returns for both purposes,—for the correcting inequalities in an assessment previously made, as well as for the making a new assessment for the whole county.

BAYLEY, J. (*a*).—I am of opinion that both the objections raised in this case are valid, and that the order of sessions, therefore, must be quashed. Upon the first point I think that the notice of appeal ought either to state in express terms that the party appealing is aggrieved, or ought to state that from which it follows of necessity that he is so. In this case the appellants, by their notice, have not brought themselves within any of the matters which are specified in the appeal clause of the statute 55 *Geo.* 3, c. 51, s. 14, as grounds of appeal. By that clause parties may appeal against the rate, first, upon the ground that the proportion assessed upon the respective parishes is unequal, that is, not unequal as between any two particular parishes by means of the ratable property being valued too high or too low, but on the ground of general inequality, or of no fixed rule having been adopted in assessing the sums to be paid by the several parishes in the county. It is not pretended that this was the real ground of appeal in the present case. The second ground of appeal is, that some one parish has been altogether and without any just cause omitted from the rate. That was not the ground of appeal here. Then follows the ground of appeal upon which the notice in this case seems partly, but not entirely or correctly, to have been founded, namely, on account of the appellant

(*a*) Lord *Tenterden*, C. J. was absent.

parish being rated at a higher proportion of the pound sterling, according to the fair annual value of the ratable property therein,—or on account of some other parish being rated at a lower proportion of the pound sterling, according to the fair annual value of the ratable property therein,—than had been fixed and declared by the justices of the peace of the said county in sessions assembled, as the basis of the rate for the said county. This probably was the ground of appeal intended to have been stated in the notice, and to have been relied on at the trial; but unfortunately the notice has not set out the whole, but a part only, of this ground of appeal, as it is described in the statute. It does not state that either the appellant or respondent parish is rated at a higher or lower proportion of the pound sterling, according to the fair annual value of the ratable property therein, than has been fixed by the justices in sessions as the basis of the rate, but merely that the appellant parish is rated at a higher proportion of the pound sterling, according to the annual value of the ratable property therein, than the respondent parish. Now it may be that both parishes are rated lower than they ought to be, and yet that the proportion of the pound sterling assessed upon them is not unequal, with reference to the sums assessed upon all the other parishes in the county; but that, if it be so, forms no ground of appeal, because the object of the statute is, that the assessment upon each individual parish should be in an equal proportion of the pound sterling with reference to the value of the ratable property of all the parishes in the county. That object would be defeated if the sessions, upon appeal, could alter the assessment upon one parish, merely because the valuation of the ratable property in that parish was higher than that of the ratable property in another parish. To lower the assessment on the appealing parish under such circumstances, would be to do injustice to the other parishes in the county. One parish is not necessarily aggrieved by being assessed at a higher valuation of the ratable property than another;

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for it may happen, and did in this case, according to the evidence, that both parishes are rated at a lower sum than they ought to be. The effect of what the justices have done in this case is, to make the assessment upon the appellant parish lower than it ought to be, and so to give a ground of appeal to every other parish in the county. I think that no parish has a right to make a partial complaint of this nature, and, looking at the facts of this particular case, I cannot see that the appellant parish has any cause of complaint at all.

LITTLEDALE, J.—I am of the same opinion. Whitstone would undoubtedly have been aggrieved if it had been assessed in a higher proportion of the pound sterling than other parishes; but that is not the fact: all the parishes in the county are assessed in one and the same proportion, namely, one farthing of the pound sterling. With respect to the notice of appeal, as the fourteenth section of the statute allows of only certain grounds of appeal therein specified, the question is, whether there existed in fact any such ground of appeal as that stated in the notice. The ground stated in the notice falls within the third, if any, of those specified in the appeal clause, namely, the parish being rated at a higher proportion of the pound sterling, according to the annual value of the ratable property, than that fixed by the justices as the basis of the rate. Then what was the rate here, and did there really exist any ground for such an appeal? In the rate, Whitstone was assessed at *3l.* *3s.* *10d.*, and Blackawton at *2l.* *11s.* *5d.* That was in an equal proportion, one farthing, of the pound sterling, according to the annual value of the ratable property in each, returned to the justices. There was, therefore, no pretence for the appeal upon the ground stated in the notice. The ground relied on at the sessions was, that the valuation of the ratable property in the appellant parish was too high, and that in the respondent parish too low; but that was not the ground stated in the notice of appeal: therefore the jus-

tices were not authorized to enter into the inquiry they did. If the notice of appeal had been so framed as to entitle the appellants to try that question, I think the justices would have had authority to amend the rate by altering the annual value according to the fact.

PARKE, J.—I agree that the order of sessions in this case must be quashed. I think it is not necessary that the notice of appeal should allege in express terms that the party intending to appeal is aggrieved by the rate, but that it is sufficient, if it can be collected from the whole of the notice, that he is in fact so aggrieved. But I am of opinion that the notice in this case was not so framed as to entitle the appellants at the sessions to go into the matters which were relied on as the grounds of their appeal. Assuming that one parish may appeal because it is rated upon a higher valuation of its ratable property than it ought to be, it appears to me that that objection is not properly stated in this notice of appeal. The appellants object that they are assessed in an improper proportion of the pound sterling, according to the annual value of their ratable property. Now that is not true; for assuming the valuation of the ratable property returned to the sessions to be correct, which this objection does not deny, both these parishes are assessed in the same proportion of the pound sterling. I think the sessions might, under the fourteenth section of the statute, have corrected an inequality in the valuation of the ratable property, if that question had been properly raised before them; and, therefore, if this notice of appeal had been correctly framed, I should have thought that the sessions had done right. Here, however, instead of altering the basis of the assessment, they have altered the assessment itself, and have thereby done that which, under the circumstances of this case at least, they had clearly no authority to do.

Order of Sessions quashed.

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DOE, on the several demises of WILLIAM JACKSON and others, *v.* ROGER HILEY.

The statute 59 *G.* 3, c. 12, s. 17, vests in the churchwardens and overseers of a parish *all* property belonging to such parish; whether applicable to the relief of the poor only, or to the purposes for which the church-rate is made only; and whether originally vested in trustees for the benefit of the parish or not.

EJECTMENT, to recover certain premises situate in the parish of St. Michael on the Mount, in the city of Lincoln. Plea: not guilty. At the trial, before *Holroyd*, J., at the Leicestershire Spring assizes, 1827, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case:—

The declaration contained several demises: one by *William Jackson*, on the 2d November, 1826; a second demise, on the same day, by *Seth Brandham*, churchwarden of the parish of St. Mark, in the said city, *Job Cartledge*, churchwarden of the same parish, and *Samuel Carr* and *Jonathan Davison*, overseers of the said parish of St. Mark; a third demise, on the same day, by the said parish officers, *Seth Brandham*, *Samuel Carr* and *Jonathan Davison*, omitting *Job Cartledge*; a fourth demise, on the same day, by the aforesaid churchwardens, omitting the overseers; and a fifth demise, on the same day, by *Seth Brandham*, churchwarden aforesaid.

The following facts were proved on the part of the lessors of the plaintiff:—

By indenture of lease, bearing date the 2d of January, 1786, *Richard Gibson* the elder, *Luke Hutchinson*, *Charles Matthews*, *John Jackson*, *Thomas Stones*, *John Wilkinson*, *Joseph Lund*, *Ralph Bowring*, and *Jonathan Glenn*, described in the said lease to be inhabitants, parishioners, and feoffees of the parish lands and church lands of and belonging to the parish of St. Mark, in the city of Lincoln, and *Joseph Smith*, churchwarden of the said parish, demised, granted, and leased to *Robert Holmes*, as well in consideration of the surrender of the former lease, as for divers other good causes and considerations therein described, as surviving executor and trustee named in the last will and testament of *John Lamb*, late of the city of

Lincoln, gentleman, deceased, two messuages or tenements, and ground thereto adjoining, situate in the said parish of St. Michael on the Mount, to hold the same to the said *Robert Holmes*, and his assigns, from the 26th day of December then last past, for and during the term of forty years then next ensuing, upon such trusts, nevertheless, as were mentioned and expressed of and concerning the said premises, in and by the last will and testament of the said *John Lamb*, deceased, paying yearly, during the said term, the rent of 30*s*, and two fat crammed capons, reserved by the said lease to the said *Joseph Smith* and his successors, churchwardens of the said parish of St. Mark for the time being.

Part of the said tenements so demised to *Robert Holmes* were in the occupation of the defendant, and were sought to be recovered in the said action. He came into possession of the premises in 1815, and paid rent for them to Christmas 1825, when the said term expired. The said *Seth Brandham* and *Job Cartledge* were sworn in as churchwardens for the parish of St. Mark, on the 5th of April, 1826, and *Samuel Carr* and *Jonathan Davison* were overseers of the said parish for the year commencing at Easter, 1826. *Thomas Sweeting* was tenant of the said demised premises under the lessee, *Holmes*, and always paid the reserved rent for the said premises to the churchwardens of St. Mark for the time being; and the defendant, *Roger Hiley*, in the year 1825, paid his proportion of the said rent for that part of the said premises in his occupation which was sought to be recovered in this action, to *William Atkinson*, churchwarden of the said parish of St. Mark, at the same time inquiring of the said *William Atkinson*, whether he was churchwarden of the parish. There was a churchwarden's book and an overseer's book. The rents were always received by the churchwardens for the time being, and credit given for them in the churchwarden's book. Upon the production of this book, the disbursements stated in it were payments usually made by the churchwardens; and the receipts stated were various reserved out-rents received by the churchwardens,

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a sum of 5*l.* 17*s.* 3*d.*, collected as a church-rate, and a sum of 6*l.* received from the overseers of the poor.

In the latter part of April, 1826, possession of the premises in the occupation of the defendant was demanded in the name and on behalf of the said churchwardens and overseers of the parish of St. Mark, when the defendant refused to deliver up possession, denying that he held any property belonging to the said parish. All the lessors mentioned in the said lease died before the year 1826. *John Jackson* survived the rest, and died on the 27th of March, 1825. *John Jackson*, by his will, dated the 14th of February, 1825, previous to the death of one of the said lessors, devised all his lands, tenements, hereditaments, and premises to his brother, *William Jackson*, who is not his heir at law, being of the half-blood, who is one of the lessors of the plaintiff, his heirs, executors, administrators and assigns, subject to the payment of his just debts.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover; if so, the verdict was to stand; if not, a nonsuit was to be entered.

The case was argued on a former day in this term, by

Amos, for the plaintiff. First, the second demise, by the churchwardens and overseers of the parish for the time being, is supported by the facts stated in the case; and upon that demise, even abandoning all the others, the plaintiff is entitled to retain the verdict. By the statute 59 *G.* 3, c. 12, s. 17, it is enacted, "that all buildings, lands, and hereditaments, which shall be purchased, hired, or taken on by lease, of the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of this act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for such parish; and such churchwardens and overseers of the poor and their successors shall and may, and they are hereby empowered to accept, take and hold, in the nature

of a body corporate, for and on behalf of the parish, all such buildings, lands and hereditaments, *and also all other* buildings, lands and hereditaments, belonging to such parish." That section, therefore, vests *all* parish lands in the churchwardens and overseers. It will be contended on the other side, that the statute has reference only to lands held for the benefit of the poor, and does not extend to lands applied in aid of a church-rate, nor, consequently, to the lands in question. But the enacting words of the seventeenth section are of the most general and comprehensive kind, and cannot be controlled by narrower and more limited expressions in the preamble and earlier sections of the act, unless the mischief to be remedied were different in the case of these two different species of parish property. Now the mischief was precisely the same in both cases, and the argument alluded to must fail. Besides, the language used in the seventeenth section of the present statute, contrasted with that adopted in the twenty-first section of the prior statute, 22 *Geo.* 3, c. 83, explains the force of the general expressions now relied upon, and shews the intention of the legislature in the adoption of them. In *Phillips* v. *Pearce* (*a*), where it was decided that churchwardens *alone*, without the co-operation of the overseers, could not grant a lease of parish lands under 59 *Geo.* 3, c. 12, s. 17, the lands in question were church lands, the rents of which had always been applied in aid of the church-rate; but that objection was not raised either at the bar or by the bench, and *Abbott*, C. J., in his judgment, described the section as applying to *all* lands belonging to the parish. It may be said that the lands now in question are trust property, and that the statute ought not to be so construed as to interfere with property of that nature. But the facts stated in the case do not go the length of proving that the donor of these lands ever appointed trustees, for the parties to the lease of 1786 are described as feoffees of all the parish lands. Besides, even if these lands were originally vested

(*a*) 8 D. & R. 43; 5 B. & C. 433.

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in trustees, it may be gathered from the statement of the case, that all the trustees were dead, which would be a very sufficient reason for giving as wide a construction to the act as the obvious meaning of the words will justify; for the difficulty of finding the heir of the surviving trustee of parish property was a very just ground for the interference of the legislature; and it appears from the year-books, 12 *H.* 7, 29 b., and 13 *H.* 7, 10, that trustees for similar purposes had frequently been created in that reign, the heirs of whom it would be extremely difficult to trace at the present time.

But, secondly, the first demise may be supported. The case of *Swift* d. *Neale* v. *Roberts*(*a*), which has generally been considered as determining that the will of a joint tenant is not good, though the joint tenancy be severed before the testator's death, and, that a joint tenancy is not devisable, was decided upon several grounds perfectly applicable to the circumstances of that case, but equally inapplicable to those of the present. A joint tenant has a valuable, though a contingent interest, and under the first statute of wills, 32 *H.* 8, c. 1, his power of devising that interest would appear indisputable. Then the second statute of wills, 34 & 35 *H.* 8, c. 5, was merely explanatory of the first, and ought to be construed liberally, and with reference to those existing customs upon which, as models, the statutes of wills were framed. The custom in this particular is recorded by *Perkins*(*b*), who gives it as his opinion, that if a joint tenant makes his will, and afterwards survives his companions, then, by custom, such devise is good; and, in *Bacon's Abridgement*(*c*), it is expressly laid down, that a joint tenant may devise the interest which is contingent on his survivorship. With respect to this devise being subject to the payment of the testator's debts, from which it may be argued that trust property will not pass under such a devise, the answer to such an argu-

(*a*) 3 Burr. 1488; Ambler, 617; 1 W. Bl. 476.

(*b*) 96 b. title, *Devise*, s. 500.

(*c*) Title, *Joint-tenant*.

ment is, that it was for the defendant to shew that the testator had other lands, besides trust lands, upon which the devise would operate, before he could bring the case within the operation of the authorities bearing upon this particular point.

N. R. Clarke, contrà, was desired by the Court to confine his argument to the question upon the second demise. —The second demise cannot be supported. It appears clearly, from the facts stated in the case, that the lands in question, though parish property, were trust lands, vested in specific feoffees or trustees; and, that the proceeds of those lands were not applicable to the maintenance of the poor, or to the general purposes of the parish, but solely to those purposes for which church rates are levied; in either of which cases the statute 59 *G.* 3, c. 12, s. 17, under which it is contended that this demise may be supported, will not apply.

First, the statute does not apply to parish property which is vested in specific feoffees or trustees. A statute having such an application would necessarily involve an interference with the will and intention of the donor, who has selected the persons whom he chose to be the trustees of his bounty; there is nothing in this statute to shew that the legislature contemplated such an interference, and it cannot be presumed that they did so. The object of this statute was, to remedy the inconvenience which had been often experienced where persons were in possession of parish houses and lands, to which no one could make a legal title, and who could not therefore be dispossessed. But in this case there could no such inconvenience arise, for there could be no difficulty here in finding the heir at law of the surviving feoffee or trustee, and bringing an ejectment in his name.

Secondly, the statute relates to such property only as is applicable to the maintenance of the poor and the general purposes of the parish. It is entitled "An Act to amend the laws for *the relief of the poor*." The preamble recites

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that it is "for the better and more effectual execution of the laws for *the relief of the poor*." The eighth section enables the parish officers to alter or enlarge any messuage or tenement "*belonging*" to the parish, for the purpose of making it a workhouse. The ninth section enables them to sell and dispose of any houses or tenements, with the site thereof, "*belonging*" to the parish, and to apply the proceeds in procuring a new workhouse. The twelfth section enables them to take into their hands any land or ground which shall "*belong*" to the parish, or to the churchwardens and overseers thereof, or to *the poor of the parish*, and to employ the poor in cultivating it on account of the parish. And the thirteenth section enables them to let any portion of "*such parish land as aforesaid*," to any poor inhabitant. Looking at these provisions, and the peculiar language of them, can it be said that the legislature intended to authorize the diverting from the use for which it was given to the parish, property in which the parishioners have an interest, but which was not intended by the donor to be applied, and was never, in fact, applied to the use of the poor? Many parishes have large funds which have been bequeathed to them for the purpose of effecting specific public objects, such as repairing churches, erecting and repairing bridges, supporting schools, &c. Can it be contended that the legislature intended to authorize the seizing those funds, and applying them in ease of the poor-rate? If not; if those questions must be answered in the negative, as they must be, then the words "belonging to the parish," must mean belonging to it *for the use of the poor:* and the seventeenth section, which is relied on for the plaintiff, only vests in the parish officers property "belonging to the parish," which therefore means property belonging to the parish *for the use of the poor.* Some reliance has been placed upon the wording of the seventeenth section, which vests in the parish officers, first, "all *such* buildings, lands," &c., and afterwards, "all *other* buildings, lands," &c. "belonging to the parish." But a reference to the early part

of that section will clearly shew that "all *such* buildings," &c., means all buildings, &c., "which shall be purchased, hired, or taken on lease" by the parish officers; and consequently, that "all *other* buildings," &c., must mean all buildings, &c., *belonging to the parish*, but neither *purchased, hired, or taken on lease* by the parish officers; leaving wholly untouched the question, whether the words "belonging to the parish" do, or do not, relate exclusively and solely to such property as belongs to the parish *for the use of the poor*.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court in the following terms:—We have considered this case, and are of opinion that the lessors of the plaintiff are entitled to recover upon that count of the declaration in which the demise is laid to have been by the churchwardens and overseers of the parish of St. Mark, in the city of Lincoln. The premises in dispute were, undoubtedly, held by that parish for parish purposes. It was contended, on the part of the lessors of the plaintiff, that the premises were vested in the parish officers of that parish by the statute 59 *G.* 3, c. 12, s. 17. On the other hand, it was insisted, on the part of the defendant, that that statute did not apply to this case, for two reasons; first, because the persons in whom the legal estate was vested were trustees only; and, secondly, because the rents and profits of the premises sought to be recovered, were applicable, not to the relief of the poor, but solely to those purposes for which the church rates were levied. Upon the first of these objections we are of opinion, that there is nothing in the act of parliament to prevent property held by trustees for the benefit of a parish from vesting in the officers of that parish, and that it would be very inconvenient that it should be so. It is often difficult for persons claiming under an ancient trust, where the trustees are numerous, to ascertain who was the last survivor of those trustees;

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and even if they succeed in ascertaining that fact, it is often no less difficult for them to shew who is the heir at law of that survivor. Property vested in trustees for the benefit of the parish seems to us to be equally within the mischief contemplated by the legislature as property not so vested.

Upon the second question—whether the statute 59 G. 3, c. 12, s. 17, extends to property, the profits of which are applicable to the purposes for which a church rate is made, or is confined to those which are applicable solely to the relief of the poor—it is undoubtedly true, that the primary object of the statute, as appears from the title, the preamble, and most of the early clauses, was the amendment and better and more effectual execution of the laws for the relief of the poor. But the seventeenth clause goes much further. It enacts, that all buildings, lands and hereditaments which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority, and for *any* of the purposes of that act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish; and such churchwardens and overseers of the poor, and their successors, shall and may, and they are thereby empowered to accept, take and hold, in the nature of a body corporate, for and on behalf of the parish, all *such* buildings, lands and hereditaments, and also all *other* buildings, lands and hereditaments belonging to such parish. The latter words are most general, and comprehend *all* buildings, lands and hereditaments belonging to the parish; and although the relief of the poor may be the primary object of the statute, we think the safest course for us to adopt, in construing this particular portion of it is, to give full effect to that generality of expression; there being nothing to shew that lands or buildings applied in aid of the church-rate, do not require the aid of this provision, as well as those which are applied to the relief of the poor. In both cases there is the same difficulty in discovering in whom the legal

estate in the premises belonging to the parish is vested, and that was the mischief which, by the seventeenth section, the legislature intended to remedy; and we see no ground for doubting that the operation of that section was intended to be co-extensive with the mischief. This being our opinion, the postea must be delivered to the plaintiff.

Postea to the plaintiff.

The King v. The Inhabitants of South Newton.

A pauper was hired as shepherd for eleven months. At the end of that time he was hired for one month. In the course of that month he was hired "to go on again upon the same terms." He continued in the service two years uninterruptedly: —Held, that the last was a general hiring, under which the pauper gained a settlement.

TWO justices, by their order, removed *Thomas Brown*, his *wife*, and their three children, from the parish of Woodford to the parish of South Newton, both in the county of *Wilts*; and the sessions, on appeal, confirmed that order, subject to the opinion of this Court upon the following case:—

The pauper, in 1823, while single, was hired as shepherd by the tenantry farmers of the manor of Lower Woodford, *for* eleven months, at 14*s.* per week, and was to have a piece of land called the "Shepherd's Croft," which was to make up money as good as 16*s.* per week, to keep certain sheep belonging to them, called the tenantry flock. Payment of his money wages was made quarterly by the

A pauper was hired as shepherd by the tenantry farmers of a manor, to keep the tenantry flock, at 14*s.* a week, and was to have a piece of land, called the "Shepherd's Croft," which was to make up money as good as 16*s.* a week; and he served a year under that hiring. The tenantry farmers were leaseholders and copyholders of the manor. By agreement of 1799, between the lord of the manor, his lessee of the manor, and the leaseholders and copyholders of the manor, arbitrators were appointed for dividing and allotting the open fields and downs within the manor, among the lessee and the leaseholders and copyholders of the manor, in lieu of the lands they had in the manor. The arbitrators allotted to the lessee of the manor, in trust for the shepherd of the tenantry flock, in lieu of lands in the manor held by custom by the shepherd, the piece of land called the "Shepherd's Croft," which the pauper had when he was hired as shepherd, and he occupied part, and let off part to a tenant, during all the time he served as shepherd:—Held, that the pauper took the land in his character of servant, in lieu of wages, and therefore that he gained no settlement by estate.

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tenantry farmers. The pauper, after serving eleven months, was hired again for one month. Before the end of that month, the pauper was hired "to go on again upon the same terms." He served a year under this last hiring, and slept the last forty nights at South Newton, the appellant parish, having married in the course of that year. The tenantry farmers above mentioned are leaseholders and copyholders of the manor of Lower Woodford. By agreement under seal, of 12th June, 1799, the parties to which were the Bishop of Salisbury, lord of the manor of Lower Woodford, the leaseholders and copyholders of that manor, and *William Beckford*, of Fonthill Gifford, Esq., who then held the manor under the Bishop for three lives, reciting (among other things) that the leaseholders and copyholders were entitled to divers lands within the manor, by virtue of the several leases and copies to them thereof granted, arbitrators were duly appointed for dividing and allotting the open and common fields and common downs within the manor. The powers of these arbitrators were, to set out, ascertain and allot the said open and common fields and common downs, so intended to be divided and allotted as aforesaid, unto and among the said *William Beckford*, in respect of such lands as he had in hand or at rack-rent, and the several leaseholders and copyholders entitled to or interested in the same, in proportion to their several and respective shares, interests and properties in and over the said open and common fields or downs. They were also empowered to set out ways, and in some respects to direct the course of husbandry. And it was agreed that the persons to whom allotments should be made, should be possessed of them for the same estates, terms and interests, and subject to the same rents and services, as the several lands in lieu whereof such allotments should be made, were subject to. Neither the shepherd of the tenantry farmers at that time, nor the pauper, *Thomas Brown*, was a party to the agreement.

The arbitrators appointed by the agreement made an

award, dated 10th October, 1808, which has been acted on ever since.

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By the award, among other allotments, they allotted to *William Beckford*, Esq., lord or farmer of the manor of Lower Woodford, in trust for the shepherd or keeper of the common sheep flock of Lower Woodford, for the time being, in lieu of lands in the common fields, held by custom by the said shepherd, "two allotments of land, that is to say, one piece of inclosed pasture, marked V, containing thirty perches, and one piece of inclosed arable land, marked *V*, containing three roods and twenty-five perches; the shepherd for the time being keeping the fences of the same in repair."

This was the land which the pauper took when he was hired as shepherd as above, and which had been possessed by former shepherds since the time of the award. The pauper let part of the land to a tenant from year to year, for about *5l.*, and received the rent: a part he always occupied himself, but never paid rates. He is still shepherd, and at the time of his removal was resident in Woodford, and had been so more than forty days. Becoming chargeable, he was removed, by order of two justices, to South Newton, without any objection on the part of his masters, or any interruption to his service, or to his possession of the said Shepherd's Croft, both of which he still retains.

Bingham and *Awdry*, in support of the order of sessions. The sessions came to a right conclusion in this case. First, there was a settlement acquired by hiring and service in South Newton, where the pauper slept the last forty nights of his second year's service; for the hiring after the eleven months' service and during the one month's service, was a general hiring; *Rex* v. *Macclesfield* (*a*); the only distinction between the two cases being, that there *the* hiring was "to stay on an end in the place," and here it was "to go on again upon the same terms," which, as re-

(*a*) 3 T. R. 76.

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gards the acquisition of a settlement, was no distinction at all.

Secondly, no settlement was acquired by estate in Woodford. The pauper occupied the land either as servant or as tenant, and in neither character was his occupation such as to confer a settlement. The policy of the law would dictate the considering his occupation as referable to his character of servant; *Rex* v. *Kelstern* (*a*). There the pauper, a married man, agreed to serve *S.* for a year as labourer, and was to have 20*l.* a year, a house and garden, a piece of land for potatoes, the milk of a cow and feeding of a pig, which were to run on a neighbouring field: he had the exclusive occupation of the house; the house was about 100 yards from the house of *S.*: the house was necessary for the performance of the service, and if the pauper had not had it, he would have had more wages. It was held that this was not a coming to settle on a tenement to confer a settlement. Independently of the decision, the observations of Lord *Tenterden*, C. J. (then *Abbott*, J.), in that case, are very strong to shew what is the policy of the law of settlement on this subject. He said, "I think it is clear that the pauper did not come to settle upon a tenement of 10*l.* a year: and I am glad that the Court is not compelled to decide that he did, because such a decision would tend much to deprive a very meritorious class of persons, namely, servants in husbandry, of many comforts which accrue to them from this species of agreement. A cottage may, of itself, be not worth 10*l.* a year; but if it is to be combined with other privileges, such as are given to the pauper by this contract, in order to bring the value to that amount, and thereby confer a settlement, I am afraid that farmers will henceforth be unwilling to grant those additional advantages to servants in husbandry, lest they should bring so many additional burthens upon the parish. I am very glad, therefore, to find that the Court is not under the necessity of holding this to

(*a*) 5 M. & S. 136.

be a settlement, for no probable addition of wages would afford an adequate compensation in point of comfort for the loss of those advantages." With respect to the mode of testing whether the occupation be in the character of servant or not, *Bayley*, J., in the same case, said, "I take the distinction to be this; if the occupation be unconnected with the service, it will confer a settlement; but if it be necessarily connected with the service, as if it be necessary for the due performance of the service, it shall not confer a settlement." The test of occupation in the character of servant therefore is, that the occupation shall be necessarily connected with the service; but its conducing to the performance of the service, though a general, is not the only criterion of such necessary connection. In this case the occupation was necessarily connected with the service, because but for the service the pauper would not have obtained possession of the land; if he had not served as shepherd, he would never have occupied the land. But if the pauper did not occupy as servant, he must have occupied as tenant,—as tenant to those by whom he was hired as shepherd, and to whom he paid rent in service of the value of 2*s.* a week, a value insufficient to confer a settlement. It cannot be said that he took any legal interest in the land under the award; for he was no party to it, and the award itself was void for many reasons. His payment of rent in the shape of service, which was equivalent to a payment in money, shews that the land was not his own, and that some other person had a beneficial interest in it. Whether that other person were the lord of the manor, or the copyholders, is perfectly immaterial; the pauper had still but the same interest, namely, that of tenant from year to year. The reversioner, whoever he might be, may be considered as having offered to let the land, and the pauper as having agreed to take it, at a rent of 2*s.* per week, payable in shepherd's service. In that view of the case, the pauper came to settle upon a tenement within the meaning of the statute 13 & 14 *Car.* 2; but the value of the tenement

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being insufficient, his occupation of it has conferred no settlement upon him.

Merewether, Serjt., and *Everett*, contrà. With respect to the settlement by hiring and service, there is one circumstance which distinguishes this case from that of *Rex* v. *Macclesfield* (*a*), namely, that there the party was hired "to stay on an end in his place," and here "to go on again *upon the same terms*." Now, if all the terms of the first agreement were incorporated in the last, the hiring in this case would not be for a year, but for eleven months only. [Lord *Tenterden*, C. J. I think the period for which the pauper was first hired cannot be considered as one of the terms intended by the parties; and then the last agreement was a hiring for a year.] Then, as to the settlement by estate, the real question is, not whether the pauper occupied the land as servant or as tenant, but whether he had not such an interest in it as made him irremovable. If, under the agreement or the award, he had an interest in the land in his own right, that made him irremovable; and it is submitted that he had. The occupation of the land in this case was not necessarily connected with the service; at least, it was not necessary for the due performance of the service; and that is the distinction pointed out in *Rex* v. *Minster* (*b*), and the case already cited of *Rex* v. *Kelstern* (*c*). Could not the pauper have maintained an action of trespass in respect of his occupation? It is submitted that he might, and that is one criterion of his having an interest in the land in his own right. The interest which he took was under the award, not under the agreement for hiring, for the award, and the interest which passed to him under it, existed long before he came to settle upon the land: he took an estate under the award, defeasible upon his ceasing to act as shepherd under the hiring. The pauper here had at least an equitable estate in the land, and

(*a*) 3 T. R. 76.
(*b*) 3 M. & S. 276.
(*c*) 5 M. & S. 136.

being resident upon it at the time of his removal, he was irremovable: *Rex* v. *Owersby le Moor* (*a*). Again,—the pauper here underlet part of the land, a circumstance, according to the opinions of *Abbott*, C. J., and *Holroyd*, J., as expressed in *Rex* v. *Lakenheath* (*b*), strongly indicative of his right to enjoy the property as his own. Still more, the pauper here was bound to keep the fences in repair, an obligation which would not attach upon any person occupying merely in the character of a servant. At all events, the pauper was tenant from year to year, and occupied a year as such; and that it would seem, upon the principles laid down by *Bayley*, J., in *Rex* v. *Herstmonceux* (*c*), would give him a settlement.

Lord TENTERDEN, C. J.—I am of opinion that the sessions have come to the right conclusion in this case. I think it quite clear that the pauper took no interest by virtue of the award or allotment in the land which he occupied. The award itself was void for many reasons, so that the pauper could not possibly have derived any legal interest from it, even if he had been a party to it, which he was not. The only interest which he had, he obtained in his character of servant from year to year. If he was tenant at all, he was tenant only to those with whom he made the bargain for his service as shepherd, and his enjoyment of the land was in the lieu of wages, which he would otherwise have received as the remuneration for that service.

BAYLEY, J.—I am of the same opinion. The pauper was clearly settled in South Newton by hiring and service, and must be maintained by that parish, unless he acquired a subsequent settlement by estate in the parish of Woodford, which I think he, as clearly, did not. As to the first

(*a*) 15 East, 356.
(*b*) 2 D. & R. 816; 1 B. & C. 531; 1 D. & R. Mag. Ca. 433.
(*c*) 7 B. & C. 551; 1 M. & R. 426; 1 M. & R. Mag. Ca. 140.

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settlement this appears;—the pauper was first hired for eleven months, then for one month, and finally, during that month, to go on again upon the same terms. That last was an indefinite hiring, and, consequently, a hiring for a year; and as the pauper resided in South Newton the last forty days, he was settled in that parish. As to the supposed settlement in Woodford, there is the agreement of June, 1799;—but what does it amount to? In the first place, it was binding upon those only who were parties to it; and the pauper was not a party to it. Then the effect of it, where binding, was only this,—that whenever a shepherd should be appointed, he should have an allotment of land for his own use, so long as he continued shepherd: it did not operate as a conveyance, but merely as an agreement between the parties who signed it. When a shepherd was appointed, he took the land, not by virtue of the agreement, but by virtue of his appointment as shepherd. Such was the pauper's case. He was hired as shepherd upon certain terms and conditions, which were pointed out to him. One of these was, that he was to have Shepherd's Croft, which, with the money wages of 14*s.* a week, was to make it as good to him as 16*s.* a week. The persons who hired him, therefore, conferred upon him the right to occupy the land; he did not take it under the agreement, and he had it only for so long a period as he should faithfully perform the office of shepherd. His right to hold the land was founded entirely upon his contract of hiring and service; therefore he had no estate or interest in the land to entitle him to a settlement. His settlement, therefore, remains in South Newton.

LITTLEDALE, J., concurred.

PARKE, J.—I entirely concur in the opinion that the sessions were right in the conclusion at which they arrived in this case. I think it quite clear that the pauper did acquire a settlement by hiring and service in the parish of

South Newton, and that he did not acquire a subsequent settlement by estate in the parish of Woodford. It has been argued, in support of the settlement in Woodford, that the pauper took either a legal or equitable estate in the land which he occupied by virtue of the award. I am decidedly of opinion that he took neither the one nor the other. The parties to the submission were the Bishop of Salisbury, Mr. *Beckford* the lord of the manor, and the lessees of the manor, the leaseholders and copyholders. But the shepherd was not a leaseholder or copyholder of the manor, nor a lessee of the manor. The arbitrators, therefore, had no power whatever to make any allotment to him, and pro tanto, at least, the award is void. There was no occupation by the pauper in his own right. He had a right, under the contract of hiring, to occupy the land while he continued shepherd; but that was not a settlement by estate, but a coming to settle upon a tenement of less than 10*l.* a year, by which no settlement could be gained.

Order of Sessions confirmed.

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A pauper settled in parish A., in 1800 inclosed a piece of waste land from a common in parish B., and held and cultivated it till 1827, when he sold and conveyed it to a purchaser. From 1800 to 1825 he resided out of parish B., but in 1825 he removed into that parish, and in 1826 built a hut on the land, in which he lived a year and a half. In 1806, 1811, and 1817, the parishioners of B. perambulated that parish, for the purpose of marking their boundaries, &c., on which occasions they pulled up a portion of the fence of the land so inclosed by the pauper, dug up part of the bank, and rode through the inclosure. In 1820 or 1822, a similar perambulation was made, and similar acts done, by direction of the lord of the manor. No acknowledgment was ever paid to the lord of the manor for the land. Held, that there was an adverse possession for twenty years, and that the pauper gained a settlement by estate in parish B.

BY an order of two justices, *Hannah Beal*, widow, and her four children, were removed from the parish of Wooburn to the parish of Chipping Wycombe, both in the county of Bucks; and the sessions, on appeal, quashed

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the order, subject to the opinion of this Court upon the following case:—

In the spring of 1800, *Daniel Beal*, the husband of the pauper *Hannah Beal*, and the father of the other paupers, being settled in the parish of Wooburn, inclosed a small piece of waste land from a common in the adjoining parish of Chipping Wycombe, and surrounded it by a bank, on which he planted a quick fence. He held and cultivated this land, subject to such interruptions as after-mentioned, until Christmas, 1827, when he sold it for 10*l.* and conveyed it by deed to the purchaser. From the year 1800 to the year 1825, *Daniel Beal* resided out of the parish of Chipping Wycombe. In the year 1825 he removed to a cottage in that parish, but not on the land in question. In the year 1826, he built a hut on the land in question, and was provided with straw to thatch it by one of the overseers of the parish of Wooburn; and up to the time of his building the hut he continued to receive relief from the parish officers of Wooburn. He lived in the hut a year and a half. In the years 1806, 1811, and 1817, the parish officers and freeholders of Chipping Wycombe perambulated the parish for the purpose of marking the boundaries, and asserting their rights of common, by throwing open encroachments on the waste. In the first year they pulled up a large portion of the fence to the said land inclosed by *Beal*, dug up part of the bank, and rode through the inclosure. In the two subsequent years they made a large gap in the fence, and again rode through the inclosure with the same object. In the year 1820 or 1822, but to which of those years in particular the witness could not speak positively, a similar perambulation was made by direction of the lord of the manor, when similar acts were done for the like purposes. It did not appear that *Daniel Beal* was present on either of these occasions, nor did it appear that any acknowledgment was paid by him to the lord of the manor, or any other person, during his occupation of this inclosure, nor that either the commoners or the

lord of the manor commenced any action, or did any other act to assert their rights, except as before mentioned. The question for the opinion of this Court was, whether, notwithstanding the interruptions before stated, *Daniel Beal*, by his occupation and residence upon the land in question, gained a settlement in Chipping Wycombe.

D. Pollock and *B. Monro*, in support of the order of sessions. *Beal* did not acquire any settlement by estate in the parish of Chipping Wycombe, by virtue of his occupation of the land in question, because that occupation was not uninterrupted, and he never had an adverse possession for twenty years. The original taking of the land from the waste was a wrongful act. *Beal* was interrupted in his possession four several times; in 1806, 1811, and 1817, by persons making perambulations on the part of the parish, and in 1820 or 1822 by persons making a perambulation by direction of the lord of the manor. On each of those occasions the inclosure was in part destroyed, and *Beal* was in effect disseised of the land, (if the term *disseisin* can be applied to a *rightful* ouster,) and each subsequent occupation by him was a new taking, and equally wrongful with the original taking. [*Bayley*, J. There is no proof that the profits of the land were taken by the persons who made any of the perambulations. The acts done by them amounted to a mere entry, and that, even if made within twenty years, by the statute 4 & 5 *Ann.* c. 16, s. 16, not being followed up by an action brought within a year, is no bar to the statute of limitations. Lord *Tenterden*, C. J. If the lord of the manor had brought ejectment, these acts of interruption would clearly not have been sufficient to entitle him to recover. *Parke*, J. I doubt very much whether the lord of the manor could take advantage of the entries made by the parishioners in 1806, 1811, and 1817; for they were not made for his benefit, but for that of the parish (*a*).]

(*a*) *Vide* Co. Litt. 245 a, 258 a; 3 Tho. Co. Litt. 18, 57, 72.

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Brodrick and *Peake*, contrà, were stopped by the Court, and

Per Curiam.—The case is too plain for argument. There has been a clear adverse possession for twenty years, and *Beal* gained a settlement by estate in the *parish of* Chipping Wycombe.

Order of Sessions quashed.

The KING *v.* The Inhabitants of LANGRIVILLE.

A pauper was hired in 1800 as labourer, at thirty guineas a year, to have a house, two gardens, and a rood of potatoes. After the bargain was made, his master said he might have the milk of a cow, and shortly after going into the service, he had the milk of a cow, which was fed on his master's close during that part of the year when cattle are pasture fed. The value of the house, gardens, and rood of potatoes, was under 10*l.* a year, but with the keep of the cow upon the land was above that sum:

Held, that the pauper did not acquire a settlement by the occupation of a tenement of the yearly value of 10*l.*; for it was no part of the contract that he should have the milk of a cow, and even if it had been, it was no part of the contract that the cow should be pasture fed.

BY an order of two justices, *Edward Ewerby* and his wife were removed from the parish of Langriville to the parish of Stickney, both in the parts of Lindsey, in the county of Lincoln; and the sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case:—

In the year 1800, the pauper became a confined labourer to a Mr. *Dickenson*, in the parish of Langriville; he was to have thirty guineas a year, a house, two gardens, and a rood of potatoes. After the bargain was made, his master said he might have the milk of a cow; and shortly after going into the service he had a cow, which was fed upon a close of his master's during that season of the year when cattle are pasture fed. The value of the house, gardens, and the rood of potatoes was under 10*l.* a-year, but with the addition of the keep of the cow upon the land, amounted to more than that sum. The Court of Quarter Sessions were of opinion that the pauper gained a settlement in Langriville, by residing there more than forty days, and occupying as above stated.

N. R. Clarke and *Hildyard*, in support of the order of sessions. The sessions were right in holding that the

pauper acquired a settlement in Langriville. *Rex* v. *Benneworth* (*a*) is a direct authority in favour of their decision. There the pauper was hired for a year, and had by agreement a house and garden, a rood of potatoe land, and the keep of a cow on his master's land. After the pauper had served two years, his cow failing in milk, he had, in lieu of the cow, two heifers kept for him, through the kindness of his master, and not in consequence of any bargain. The potatoe land and the two heifers were of the annual value of 10*l.*; but the potatoe land and the keep of the one cow were of less annual value than 10*l.* It was held that the keep of the two heifers was a tenement. It was no part of the contract in that case that the heifers should be pasture fed; and it will be contended, on the authority of the subsequent case of *Rex* v. *Thornham* (*b*), that the contract in this case should have contained a stipulation for the milk of the cow, and that the cow should be pasture fed. It must be admitted that the decision in *Rex* v. *Thornham* does go that length, and that if that case is to be considered as over-ruling *Rex* v. *Benneworth*, it must be part of the contract that the cow shall be pasture fed. But *Rex* v. *Benneworth* was decided after full argument and consideration, and cannot be considered as over-ruled by *Rex* v. *Thornham*, for it is not mentioned in it. But admitting that, for the purpose of a settlement in this case, it must have been part of the contract that the cow should be pasture fed, still it is not necessary that that should be expressed in the contract. The contract must be presumed to have been made in conformity with the usage of the country; and where that usage appears, must be so construed. Now it is the usage in that part of the country where this contract was made, that during a certain portion of the year cattle shall be pasture fed, as appears by the words in the case, "during that season of the year when cattle are pasture fed." In hiring a servant, it need not be

(*a*) 4 D. & R. 355; 2 B. & C. 775; 2 D. & R. Mag. Ca. 319.

(*b*) 9 D. & R. 752; 6 B. & C. 738; 4 D. & R. Mag. Ca. 494.

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expressed that he is to be fed in his master's house, for that is taken to be understood, because it is customary. For the same reason it is unnecessary to stipulate that the cow shall be fed on the master's land, that being customary also.

Fynes Clinton and *Waddington*, contrà. In order to acquire a settlement of this nature, the pauper must be of right, that is, by the terms of his contract, in the enjoyment of some interest arising out of land of the annual value of 10*l.* Here the pauper had, by his contract, an interest in his master's land, but not of the requisite value, for the permission to have the milk of a cow was a mere act of favour on the part of his master, which was granted after the contract was complete, and which might have been withdrawn at any moment. *Rex* v. *Benneworth* is perfectly distinguishable from the present case, for there the two heifers were merely substituted for the cow, which the pauper was by his contract entitled to keep on his master's land. Besides, there is nothing here to shew that the cow was to be fed on growing produce; whereas *Rex* v. *Sutton St. Edmund's* (*a*), *Rex* v. *Bardwell* (*b*), and *Rex* v. *Thornham*, are direct authorities to shew that there must be an agreement, or at least an undertaking, to that effect: and this defect is not supplied by the fact found, that the cow was actually so fed.

The case was argued on a former day in this term, when the Court took time for consideration; judgment was now delivered by

Lord TENTERDEN, C. J.—The question in this case was, whether a settlement was acquired by the occupation of a tenement of the yearly value of 10*l.* in the parish of Langriville. In order to constitute this species of settle-

(*a*) 2 D. & R. 800; 1 B. & C. 656; 1 D. & R. Mag. Ca. 424.

(*b*) 3 D. & R. 369; 2 B. & C. 161; 2 D. & R. Mag. Ca. 53.

ment under the statute 13 & 14 *Car.* 2, c. 12, it is necessary that the pauper should have an *interest* in the subject of the occupation (such subject being of the requisite yearly value), *as tenant or occupier*, though it is not necessary that he should be under an obligation to pay rent, or that he should have more than an estate at will; *Rex* v. *Fillongley* (*a*). It has also been established, by a series of cases which were considered and confirmed in that of *Rex* v. *Benneworth* (*b*), that it was a sufficient occupation of a tenement if the pauper had an interest in a part of the profits of the land, by perception, by the mouths of his cattle. But it is essential, whether the subject of occupation be the land itself, or a part of its profits, that the pauper should have *an interest* as tenant or occupier; a possession by mere licence, without that interest, is not enough. If a person were permitted by the owner of a pasture to feed his cow or sheep upon it, for a time, without any valuable consideration, and without reference to any contract between them, but by a mere act of charity or favour, no settlement would be gained by such a permissive enjoyment of the produce of the land.

But, if there had been a contract with the owner for a sufficient consideration, by which the pauper had a right to part of the profits of the soil, to be taken by his cattle, he would have an interest; and his occupation with that interest (if those profits were of the requisite annual value), would confer a settlement after a residence of forty days.

In the case of *Rex* v. *Benneworth*, which was so much relied on in the argument of this case by the counsel for the appellants, as an authority to shew that a gratuitous occupation was sufficient, it appeared that two heifers were substituted by the consent of the master for the cow which the pauper had a right, by his contract, to feed on his master's land. The pauper in that case, therefore, may be considered as having had, by the act of the owner of the

(*a*) 1 T. R. 458.
(*b*) 4 D. & R. 355; 2 B. & C. 775; 2 D. & R. Mag. Ca. 319.

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soil, as much interest in the land by the feeding of the heifers, as he had before by the feeding of the cow. The perception of the larger portion of the profits by the former was equally referable to an interest in the land, as that of the smaller portion by the latter.

In the present case, however, the sessions have found that the master gave permission to the pauper to have the milk of a cow, after the bargain between them had been completed; and though it be taken that the cow was to be fed on the land, and that the master meant at the time that the cow *should be fed on the land* (which, however, does not distinctly appear, nor is there any thing to shew that he would not have kept his promise, and even performed his contract, by allowing the milk of a cow fed otherwise than on the land), we think this must be considered as having been done in consequence of a mere act of kindness or favour on the part of the master, not referable to any contract, and that no interest was thereby acquired by the pauper in the profits of the land. It follows from this that no settlement was gained by the pauper in Langriville.

Order of Sessions quashed (*a*).

(*a*) As to the right of a dairyman to vote as a 50*l.* occupier under the 20th section of the Parliamentary Reform Act, (2 *W.* 4, c. 45,) see *John Brent's* case, Manning's Notes of Revision, 183, edition of 1836.

FISHER *v.* CLEMENT.

Whether matter written or printed by *A.*, concerning *B.*, is libellous, depends not upon the intention of *A.* to injure *B.*, but upon the tendency of the publication to produce the injurious effect.

CASE for a libel. The declaration stated the following matters of inducement, as applicable to all the counts:—That the plaintiff was a married man, having a wife and eight children: that one *John Joseph Stockdale* had printed and published of and concerning plaintiff a certain false, &c. libel, containing, amongst other things, the false, &c. matter following, of and concerning the said plaintiff, setting out a libel upon the plaintiff, purporting to be written by

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one *Harriette Wilson*, in which the plaintiff is charged with immoral and profligate conduct, and is called "a dirty nearly six foot Devonshire Lawyer and a wretch." That *Fisher* impleaded *Stockdale* for the printing and publishing of such libel. That *Stockdale* pleaded not guilty. That a verdict was found for the plaintiff, *Fisher*, damages, 700*l*. That the now defendant *Clement*, contriving to injure &c. *Fisher*, and to cause it to be believed that he had been guilty of the misconduct thereby imputed to him, and that he being such husband and father, was an abandoned and profligate man, and had been and was frequently engaged in intrigues and immoral connections with females, did print and publish, and caused to be printed of and concerning the plaintiff, a certain false, &c. libel, containing &c., the false, malicious &c. matter following of and concerning the plaintiff, that is to say—(Here were set out some doggrel lines, containing a supposed dialogue between *Harriette Wilson* and *Stockdale*, entitled "*St-ck-d-le* and *Har-riette W-ls-n*, a London Eclogue.") The parts supposed to relate to the plaintiff were these: "With recent verdicts out of tune—To *Fisher*" (thereby meaning the plaintiff) "Blore, large sums were given,—To one 300*l*., t'other seven.—Much *St-ckd-le* feared lest such a sample—Make others follow the example. *Stockdale*—'Twould be too hard to pay for truth. *Harriette*—But truth has a far keener tooth—Than falsehood, for we may despise—What we all know a pack-of-lies.—I wrote what was not only new,—But also in its substance...." (Thereby meaning in its substance true.) The declaration also contained two other counts.

The defendant pleaded not guilty, and upon the trial of the issue before *Best*, C. J. at the London sittings after Michaelmas term, 1826, a general verdict was found for the plaintiff, with entire damages, upon which judgment was entered up in Common Pleas. A writ of error being brought in the King's Bench, this Court reversed the judgment upon the insufficiency of the second count, and a venire de novo being awarded, the cause was tried at

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the London sittings after Trinity term, 1828. It was contended on the part of the defendant, that the tendency of the publication was to attack *Harriette Wilson* and *Stockdale*, and not to injure the plaintiff. For the plaintiff it was contended, that whatever might be the intention of the defendant with respect to *Harriette Wilson* and *Stockdale*, the statement represented in the libel to have been made by the former—that she could answer *Fisher*'s case, and thereby destroy his defence to the defamatory charge made against him—tended to injure the character of the plaintiff. In summing up the case Lord *Tenterden*, C. J. said, that the question for the jury was, the *intention* of the publication; whether it was intended to aver the truth of *Stockdale*'s libel, and thereby to injure the plaintiff, or whether the object of the publication was to reflect on *H. Wilson* and *Stockdale*, and whether any person reading the eclogue would receive an unfavourable impression of the plaintiff. The jury found a verdict for the defendant. In Hilary term, 1829, *Campbell* obtained a rule nisi for a new trial, on the ground that the *intention* ought not to have been left to the jury; and that they should have been directed to find for the plaintiff, if they thought that the *tendency* of the publication was to injure him.

Scarlett, A. G. and *Platt*, (with whom were *Denman* and *Brougham*,) now shewed cause. The jury were told by the learned judge, that if by the publication it was intended to cast a reflection upon the plaintiff, they ought to find a verdict for the plaintiff, but that if the intention was merely to cast a reflection upon *H. Wilson* and *Stockdale*, they ought to find for the defendant. It is true that the intention of the publisher of a libel is in general an inference of law, resulting from the nature of the publication itself. Here the tendency and the intention *must* be the same, for the learned judge went on to say, if you think that any person could receive an unfavourable impression of the plaintiff from reading this libel, you are to find the verdict for the plaintiff.

This is no libel. All that the plaintiff complains of is, that the persons introduced are made to speak in character, and he might as well have indicted the printers of the Bible for saying "The Fool has said in his heart there is no God;" or the publishers of *Milton's* Paradise Lost, for the blasphemous words which the poet has put into the mouths of his devils. The whole case was before the jury, and they found that the publication was not libellous.

Campbell and *Manning* contrà. The primary object of the libel was obviously to attack *H. Wilson* and *Stockdale*, and from the manner in which the case was left to the jury by the learned judge, they would naturally consider that they were to find their verdict for the defendant, because, notwithstanding the necessary tendency of the libel to injure the plaintiff, they may have thought that such consequence was entirely overlooked by the defendant, whilst pursuing his main object of attacking *H. Wilson* and *Stockdale*. With respect to the observation, that the jury found that the publication was not libellous, the answer is, that in civil actions the question of libel or no libel, is matter of law to be decided by the judge, and not matter of fact to be ascertained by the jury. (*a*)

The malicious intention is also matter of law, resulting from the decision of the question, whether libel or no libel. Thus, in *Bromage* v. *Prosser* (*b*), which was an action of slander for words of insolvency, the jury were told, that if they thought the words were not spoken maliciously, though they might unfortunately have produced injury to the plaintiffs, the defendant ought to have their verdict. But this Court granted a new trial, on the ground that a

(*a*) By 32 *Geo.* 3, c. 60, (Mr. Fox's Act,) it is *declared* and enacted, that on the trial of an *indictment* or *information* the jury may give a general verdict of guilty or not guilty, and shall not be required to find the defendant guilty merely on proof of publication, and of the sense ascribed in the indictment or information. As before the passing of the act the law was the same in civil and in criminal proceedings, *quære*, whether the circumstance of its being a *declaratory* act makes its provisions in any degree applicable to *civil* cases.

(*b*) 6 D. & R. 296; 4 B. & C. 247.

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question of malice ought not to be left to the jury in cases of slander or libel, except where the publication bears the character of a privileged communication, which by destroying the implication of malice, renders express malice necessary to support the action, the existence of which is a proper matter to be left to the consideration of the jury.

Lord TENTERDEN, C. J.—The direction to the jury was substantially correct; and though not expressed with strict accuracy, would be understood by the jury, who were not accustomed to technical distinctions, as importing that they were to find their verdict for the plaintiff if they were of opinion that the *tendency* of the publication was to injure his character. I did not leave the *intention* of the publisher, as a distinct question and independent of the *tendency* of the publication. I have always thought, and have frequently expressed my opinion, that a person who publishes that which is injurious to the character of another, must in point of law be considered as intending to produce the consequences which ordinarily result from such a publication.

BAYLEY, J.—The jury were told to consider whether it was the intention of the publication to injure the plaintiff, by representing that the prior libel was true. They were afterwards directed to find a verdict for the plaintiff, if they thought that any person reading the publication would receive an unfavourable impression of the plaintiff. The jury must therefore have understood that the intention was to have been collected from the publication itself, and that was clearly a question for them (*a*).

LITTLEDALE, J. concurred.

PARKE, J—The direction of the learned judge, though not critically accurate, was substantially correct. It was

(*a*) But see *Haire* v. *Wilson*, *ante*, vol. iv, 605; 9 B. & C. 643.

impossible for men of common sense, taking the whole of the direction together, not to understand that the matter for their consideration was, whether the tendency of the publication was to injure the plaintiff.

Rule discharged.

MERCER *v.* OLIVER SAXBY DAVIS.

TRESPASS against the high constable of the town and parish of Maidstone, for distraining the goods of the plaintiff, one of the overseers of that parish, for 157*l.* 16*s.* 1*d.*, the amount of a rate of 1½*d.* in the pound, made on all the ratable property within the town and parish, as a town stock or rate in the nature of a county rate. Plea: not guilty. At the Kent spring assizes, 1828, a verdict for nominal damages was taken, subject to the following case:

Maidstone is a corporate town, and was first incorporated by charter, 3 *Edw.* 6 (1549), and has been so continued to the present time, by five other charters; viz. 2 *Eliz.* (1559), 2 *James* 1 (1604), 17 *James* 1 (1620),

Where (before the passing of the Municipal Corporation Reform Act, 5 & 6 *W.* 4, c. 76,) the charter of a borough contained a non-intromittant clause, excluding the county magistrate, a rate in the nature of a county rate might have been enforced by the borough magistrates under 55 *G.* 3, c. 51. (*a*)

(*a*) But now, by 5 & 6 *W.* 4, c. 76, s. 111, the justices assigned to keep the peace in and for the county in which any borough is situated, to which his majesty shall not have granted that a separate Court of Quarter Sessions of the Peace shall be holden in and for the same, shall exercise the jurisdiction of justices of the peace in and for such borough, as fully as by law they and each of them can or ought to do in and for the said county; and no part of any borough in and for which a separate Court of Quarter Sessions of the Peace shall be holden, shall be within the jurisdiction of the justices of any county from which such borough, before the passing of the act, was exempt, any law, statute, letters-patent, charter, grant, or custom, to the contrary notwithstanding." And by s. 112 it is enacted, "that within ten days after the grant of a separate Court of Quarter Sessions of the Peace to any borough, the council of such borough shall send a copy of such grant, sealed with the seal of the borough, to the clerk of the peace of the county in which such borough or any part thereof is situated; and after the grant of such Court to any borough it shall not be lawful for the justices of the peace of any county wherein such borough or part of such borough is situate, to assess any messuages, lands, tenements, or hereditaments, within such borough, to any county-rate thereafter to be made, but every part of every such borough shall thenceforward be wholly free and discharged from contributing, otherwise than is hereinafter provided, to any rate or assessment of any kind, of and for the county in which any part of such borough is situated."

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34 *Charles* 2 (1682), and 21 *Geo.* 2 (1747), which last-mentioned charter was duly accepted by the inhabitants of the town and parish, and after therein reciting that the town and parish was an ancient and populous town, and had enjoyed divers liberties &c. by virtue of certain charters of former kings or queens of England, by the name of the mayor, jurats and commonalty of the town and parish of Maidstone in the county of Kent, it was granted and ordained that the said town and parish should for ever thereafter be and remain a free town and parish of itself, and that the inhabitants thereof should be a body corporate in deed and name, by the name of "The Mayor, Jurats, and Commonalty of the King's Town and Parish of Maidstone, in the County of Kent;" and for the better preserving and keeping of the town and parish in peace and good government, it was ordained that the mayor and recorder of the town and three senior jurats should be justices to preserve the peace within the town and parish, and to do and execute all and singular matters and things which belong to the office of a justice of the peace, in as ample manner as other justices of the peace for the county of Kent had been accustomed to do and execute,—that no justice of the peace of the county of Kent should in anywise intermeddle within the said town and parish to do any thing which there belongeth or appertaineth to the office of a justice of the peace,—that the mayor, recorder, and justices of the town and parish, or any three of them (of whom the mayor and recorder should be two) should from thenceforth for ever have full power and authority to inquire of, hear, and determine all trespasses and misdemeanors whatsoever, arising within the town and parish, as justices of the peace of the county, or any two or more of them, might or could do or perform, as well in as out of their sessions, by virtue of the commission to them made for that purpose,—so as that they nevertheless did in nowise proceed to the determining of any treason or felony, or any other offence touching the loss of life or

member, without the special mandate of his majesty in that behalf: And that the said mayor, jurats and commonalty might take and receive to their own use, all fines, forfeitures and issues of jurors for their non-appearance, and also fines and forfeitures for trespasses and other misdemeanors, and contempts before the mayor, recorder and three jurats, justices, from time to time happening, growing, or arising within the town and parish; that the mayor for the time being should be the coroner for the town and parish; that the mayor, jurats and commonalty should take and enjoy to their own use, wharfage and anchorage of all ships and other vessels coming to the town and parish; that the mayor, jurats and commonalty, or the major part of them, for the better support of the charges of the town and parish, or for other reasonable causes or respects, or for the public good and benefit of the town and parish, and of the inhabitants thereof, should and might lawfully from time to time make, impose, and assess reasonable taxes and assessments upon themselves, and every inhabitant there, and might take and levy the same by distress, or in any other legal manner as they had theretofore been used and accustomed; and that the mayor, jurats and commonalty should and might have, hold, and enjoy from thenceforth for ever, all such lands, tenements, hereditaments, goods and chattels, liberties, powers, authorities, franchises, immunities, indemnities and free customs, as the said town and parish, or the then late mayor, jurats and commonalty before the then late dissolution of the said corporation or their predecessors, had lawfully had or enjoyed by virtue of any charters or letters-patent of his said majesty, or any of his progenitors, theretofore kings or queens of England, or otherwise, by any lawful means, right or title whatsoever, although the said franchises, liberties, immunities, and free customs had not been theretofore used, or, it might be, had been abused by them or their predecessors, and although some of them were, and others were not, particularly enumerated therein.

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The management of the poor of the parish of Maidstone is by an act of parliament, 20 *Geo.* 3, vested in certain trustees, of whom the mayor and the three senior jurats (not being justices of the peace for the town), and the churchwardens and overseers of the poor for the time being, are part, by whom the rates for the relief of the poor, and for any other purposes to which they are by law applicable, are made, and the disbursements superintended.

The paving, watching, and lighting the town and parish, and maintenance of the highways, are conducted by commissioners, and paid for by rates appointed and made under other acts of parliament of 31 & 59 *Geo.* 3, and those commissioners have erected a watch-house in the town.

There is a certain bridge in the said town and parish over the river Medway, the piers, arches, and side walls of which have been hitherto supported out of the poor-rates, but the foot and carriage pavements over the same bridge, ever since the passing the first above-mentioned Pavement Act, 31 *Geo.* 3, 1791, have been repaired by the commissioners under that act, and before then were repaired by the surveyors of the highways out of the highway rates.

Up to 1804 the town gaol consisted of two rooms at the top of the town-hall, and, with the town-hall, was maintained by the mayor, jurats, and commonalty, out of the corporation funds, but in that year the trustees of the poor erected (the expense of which erection was defrayed from the poor-rates) a certain building within the walls of the workhouse premises, and appropriated the upper part of it to the purposes of a town gaol, and the lower part to the use of the poor, and from that time the gaol at the top of the town-hall was disused.

In 1824, this last-erected prison being found to be insufficient for the purposes of the town as well as insecure, the mayor and justices, under the powers and authority of 5 *Geo.* 4, c. 85, entered into a contract with the

justices of Kent for the maintenance of the town prisoners in the county gaol and house of correction, from the time of commitment till the time of trial and conviction, or the discharge of the prisoners; and the sums payable under such contract have been paid by the trustees out of the poor-rates, and such maintenance, on an average of the last three years, has amounted to the sum of 170*l.* a year. And upon this contract being entered into, the above-mentioned building was disused as a prison, and the whole of it appropriated to the use of the poor, and no other prison is now made use of than the above-mentioned watch-house.

The expenses of prosecutions of prisoners, and of the witnesses in cases of felony at the assizes, and at the Kent quarter sessions for offences committed within the jurisdiction of the mayor and justices of the town (which is co-extensive with the parish) were formerly and till the year 1820 always paid by the treasurer of the county of Kent, out of the county rate; but about that period the justices of the county, alleging that the county was not liable to those expenses, and that they had been paying them in error, refused to defray them any longer, and from that time those expenses have been and still continue to be paid by the trustees of the poor from the poor-rates, upon the orders of the judges of assize and justices of the county quarter sessions.

At a general quarter sessions of the peace duly holden in and for the town and parish of Maidstone on the 26th October, 1825, before the mayor, recorder, and three justices of the town and parish, the said mayor, recorder, and three justices, did order a rate and assessment to be made upon all the ratable property within the town and parish, as a town stock or rate, in the nature of a county rate, to be applied and disposed of in such a manner and for such purposes as such rate was then or might thereafter be made applicable to by law, at the rate of three-halfpence in the pound, upon the sum of 25,249*l.* 5*s.*, the then

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annual value of the said ratable property, amounting to the sum of 157*l.* 16*s.* 1*d.*, and that the constable of the town and parish, which the defendant then was, should collect and receive from the churchwardens and overseers of the poor of the said parish of Maidstone, the said rate of 157*l.* 16*s.* 1*d.*, and pay the same into the hands of the treasurer appointed to receive the same, at or before the then next general quarter sessions of the peace to be holden for the town and parish.

The defendant accordingly, and in pursuance of the said order, and in the mode prescribed by the act of 55 *Geo.* 3, c. 51 (*a*), s. 12, served a notice in writing upon the plaintiff (who was then one of the churchwardens of the parish of Maidstone), requiring the plaintiff, within 30 days of the receipt of the said notice, to pay out of the money collected by him for the relief of the poor of the parish of Maidstone, the sum of 157*l.* 16*s.* 1*d.* so rated and assessed upon the parish of Maidstone as aforesaid.

The said sum of 157*l.* 16*s.* 1*d.* was not paid by the plaintiff or the other churchwarden, or by the overseers of the poor of the said parish, within 30 days after the receipt of the said notice.

A summons under the hand and seal of one of the justices for the town and parish was issued, by which the plaintiff and the other churchwarden, and the overseers of the poor of the parish of Maidstone, were summoned to shew cause why they had neglected and refused to pay the said rate or assessment, which summons was served upon the plaintiff.

The plaintiff did not, nor did the other churchwarden or the overseers of the poor of the parish, attend such summons, or shew any good cause why they had neglected and refused to pay the said rate or assessment; and that the said justice issued a certain warrant under his hand and seal, commanding the defendant to levy on the goods and chattels of the plaintiff, as such churchwarden, the said

(*a*) The County-Rate Amendment Act.

sum of 157*l.* 16*s.* 1*d.*, so rated and assessed upon the parish.

The defendant as such constable accordingly executed the warrant, by seizing and taking the goods. For such act of levying this action is brought.

Every thing done and executed by the justices and the defendant, touching the said rate or assessment and levy, was done and performed properly and legally, provided the justices had power to make the rate.

Before this action was commenced, a demand in writing of a perusal and copy of the warrant under which the defendant acted, signed by the plaintiff, was made on the defendant (*a*); and the same was refused and neglected to be given by the defendant for the space of six days, nor was it given at any time before this action was commenced.

This action was commenced within three months from the time of the making of such distress and levy.

The inhabitants of the town and parish of Maidstone never contributed to the rates of the county of Kent, and until the rate in question was made in 1825 upon the parish of Maidstone, in the nature of a county rate, no such rate was ever made within the town and parish.

The mayor, jurats, and commonalty have never taken wharfage or anchorage for ships or other vessels coming to the town, nor has the clause in their charter for making rates and assessments upon the mayor, jurats, and commonalty, and other inhabitants, been ever acted upon.

Manning (with whom was *Platt*) for the plaintiff. The 55 *Geo.* 3, c. 51, s. 24, under the supposed authority of which this rate was imposed, applies only to particular districts not being within the jurisdiction of the justices of the peace appointed for the county at large. In *Rex* v. *W. Clark* (*b*)

(*a*) Under 24 *Geo.* 2, c. 44, *vide Price* v. *Messenger*, 2 Bos. & Pull. 158; 3 Esp. N. P. C. 96, 101; *Sturch* v. *Clarke*, 1 Nev. & Man. 671; 4 B. & Adol. 113; *Barrons* v. *Luscombe*, 5 N. & M. 330.

(*b*) 1 Dowl. & Ryl. 316; 5 Barn. & Alders. 665.

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it was held, that the inhabitants of the city of Bath were liable to be assessed to the Somerset county rate, although they had magistrates of their own, because those magistrates had no jurisdiction in cases of felony; it was therefore considered that the jurisdiction of the county magistrates was not taken away by the charter. Here, the borough magistrates have no jurisdiction in cases of *felony*; such cases, therefore, may be tried at the quarter sessions of the county of Kent. Before the case of *Rex* v. *W. Clark*, the Court put a similar construction on 13 *Geo.* 2, c. 18, s. 7, in *Bates* v. *Winstanley* (*a*). [*Bayley*, J. In *Rex* v. *W. Clark* the Court only decided that a place within the county having a separate commission of the peace, was not wholly exempt from contribution to the county rate, except where the separate jurisdiction extended to all matters to which a county rate is applicable. In *Rex* v. *Myers* (*b*), which was an indictment against the Secretary of the division of Kesteven, in the county of Lincoln, for disobedience of an order made upon the defendant by Mr. Baron *Hotham*, for the payment and expenses of a prosecution for an offence committed in the town of Stamford,—the justices of which had an exclusive jurisdiction,—the Court held, that the indictment could not be supported, because the order ought to have been made upon the treasurer of the town of Stamford. So here, the expenses of prosecutions at the assizes for felonies committed in Maidstone, may be ordered to be paid out of the town rate. *Parke*, J. The charter containing an absolute and unqualified non intromittant clause, the justices of the county of Kent can make no rate which shall include Maidstone; this case is therefore very different from the Bath case.] The Bath case was decided on the ground that the city magistrates had no jurisdiction to try felonies. A similar omission occurs in the Maidstone charter. The chartered district

(*a*) 4 Maule & Selw. 429.

(*b*) 6 T. R. 237; and see *Rex* v. *Johnson*, 4 Maule & Selw. 515; *Rex* v. *Treasurer of Surrey*, 1 Chit. Rep. 650.

cannot be exempt from *part* of the county rate; it must be exempt altogether, or liable to the whole, and if so liable, it cannot be also liable to a rate within the chartered district, in nature of a county rate.

Campbell contrà was stopped by the Court. He afterwards referred to *Talbot* v. *Hubble* (*a*).

BAYLEY J.—*Weatherhead* v. *Drewry* (*b*) establishes, that where a town corporate has an exclusive commission of the peace, although it be not a county of itself, the local magistrate may levy a rate in the nature of a county rate. There are many purposes to which a county rate is applicable. They are collected in *Burn's* Justice. Here you have a charter containing a non intromittant clause. There is no single act in the character of justices which the county magistrates can do. If the case of *Rex* v. *W. Clark* (*c*) were applicable, we should be driven to consider whether a rate, in nature of a county rate, could be raised for one purpose only. But it seems to me that that case may be distinguished from the present. The magistrates of Bath had not a *general* jurisdiction. Here the justices of the borough, not being county magistrates, were only entitled to commit to the gaol of the borough. It is said, on the part of the plaintiff, that the person so committed must remain in prison for an indefinite time. But the borough magistrates would have authority to remove such prisoners to the assizes for trial, and they would be naturally anxious to remove them; the argument, therefore, from *Rex* v. *W. Clark* does not apply. If the town of Maidstone had a treasurer and rates,—as it ought to have,—then, according

(*a*) 2 Stra. 1154, where it was held, that county magistrates cannot act under 12 *Car.* 2, c. 23, s. 31, and 15 *Car.* 2, c. 11, s. 22, in matters of excise, within a district having an exclusive commission of the peace. And see *Rex* v. *Sainsbury*, 4 T.R. 456. As to local jurisdiction in matters of excise, see *Kite, exparte*, 2 D. & R. 212; *Kite* and *Lane's* case, 1 B. & C. 103.

(*b*) 11 East, 168.

(*c*) 1 Dowl. & Ryl. 316; 5 Barn. & Alders. 665.

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to *Rex* v. *Myers*, where expenses were incurred in the prosecution of felons, an order would be made upon such treasurer for such payment. In that case, the town of Stamford had exclusive jurisdiction, and it was held, that the order for the payment ought to be made upon Stamford. So here the order ought to be on the treasurer of Maidstone, there being a non intromittant clause, and consequently no power to issue a warrant to levy county rates.

LITTLEDALE, J.—I am of the same opinion. *James* v. *Green* (*a*) is an authority to shew that a rate, in nature of a county rate, may be levied for a town incorporated within the time of legal memory. That was the case of the town of Nottingham, which is a county of itself; but *Weatherhead* v. *Drewry* extends the rule to a town-corporate which is not a county of itself. By the non intromittant clause in this charter the county magistrates have no right to come into Maidstone for *any* purpose. All felonies committed there must be tried at the assizes, unless a special commission be issued. It seems to me, that if the borough magistrates cannot make a rate no one can.

PARKE, J.—Here, by charter, there is a commission of the peace within the borough, and it is clear that the borough is not subject to the county commission for *any* purpose. The words of the charter are very large. *Rex* v. *W. Clark* certainly contains expressions which favour Mr. *Manning's* view; but the case itself is distinguishable; the Bath justices had no exclusive jurisdiction (*b*).

Postea to the defendant (*c*).

(*a*) 6 T. R. 228.

(*b*) And see *Rex* v. *George Shephard* (high constable of the borough of Marlborough), 4 Nev. & Mann. 185, 2 Adol. & Ellis, 298; *Rex* v. *Theophilus Jeyes*, 5 Nev. & Mann. 101, 3 Adol. & Ellis, 416.

(*c*) This, and the last preceding case, were decided in Hilary term.

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THE following case was sent by Sir *L. Shadwell*, V. C., for the opinion of this Court:—

Samuel Hunt was, at the respective times of making the surrender and will, and until his death, seised to him and his heirs, according to the custom of the manor of Kennett-within-Kentford, in the county of Cambridge, of a messuage or farm, house and homestall, and pasture land, containing 1A. 2R. 20P., and of certain open field lands, rights of sheepwalk, rights of common, and an old inclosure, respectively parcel of and within (*a*) the said manor, and situate in the parish of Kennett, in the said county. *Hunt* surrendered his copyholds to the use of his will.

1813. By will, bearing date 24th August, and duly executed and attested, *Hunt* devised unto the plaintiffs all his copyhold estates; habendum to the plaintiffs and their heirs, in trust to sell, with the usual powers for that purpose.

1813. By "An act for inclosing lands in the parish of Kennett, in the county of Cambridge,"—after reciting that in the parish there were certain old inclosures, open and common fields, common meadows, heaths, and other open and commonable lands and waste grounds, and further reciting that the lands in the said open and common fields lay intermixed and dispersed in small parcels, and that the said common meadows, heaths, and other open and commonable lands and waste grounds, in their then state yielded but little profit, and were incapable of any considerable improvement, and that it would be very advantageous if the same were divided and allotted amongst the several owners thereof and persons interested therein, in proportion and according to their respective estates, rights and interests in the same, and if such allotments were inclosed so far as was expedient,—*Charles Wedge* and *Edward Gibbons* were thereby appointed commissioners for carrying the purposes

By an inclosure act, commissioners are authorized to allot shares of the inclosed lands in compensation for rights of common, and also to allot lands, &c. in exchange for other lands, &c., provided such exchanges be specified in their award, and be made with the consent of the owners. The commissioners award a certain allotment to *A.* as a compensation for his rights of common, and *an old inclosure given up by A. to be allotted by the commissioners in exchange.* This award is bad, and *A.* acquires no title to the allotment.

(*a*) *Vide ante*, 140 (*a*), 144 (*b*).

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of the General Inclosure Act and the said act into execution, subject to the regulations of the General Inclosure Act(a) in all cases, except where the same were by the said act varied and altered; and after giving various directions to the said commissioners relating to the execution of their duties under the said act, it was enacted, that the said commissioners should then set out, allot and award unto the several proprietors and owners thereof, and persons having a right of common or other interest therein, all the then residue and remainder of the lands and grounds thereby directed to be divided and allotted, in such quantities, shares and proportions as the said commissioners should adjudge and deem to be a just compensation and satisfaction for, and to be equal to, their several and respective lands, grounds, rights of common, rights of sheepwalk, and other rights and interests therein. And it was thereby further enacted, that it should be lawful for the said commissioners to set out, allot and award any lands, tenements and hereditaments, within the said parish of Kennett, in lieu of or in exchange for any other lands, tenements or hereditaments within the said parish, or within any adjoining hamlet, parish or place; provided that all such exchanges should be ascertained, specified and declared in and by the award of the said commissioners, and should be made with the consent of the owner or owners, proprietor or proprietors, of the lands, tenements or hereditaments, which should be so exchanged, whether such owner or owners, proprietor or proprietors, should be a body or bodies politic, or corporate or collegiate, or a tenant or tenants in fee simple, in fee tail, or for life, or by the courtesy of England, or for years determinable on a life or lives, or having a beneficial lease for years, or with the consent of the guardians, trustees, feoffees for charitable or other uses, husbands, committees, or attorneys, of or acting for any such owners or proprietors as aforesaid, who at the

(a) 41 *Geo.* 3, c. 109. And see the subsequent act of 1 & 2 *Geo.* 4, c. 23.

time of making such exchange or exchanges should be respectively infants, femes covert, lunatics, or under other legal disability, or who should be beyond the seas, or otherwise disabled to act for themselves, such consent to be testified in writing under the common seal of every such body politic, corporate or collegiate, and under the hands of the other consenting parties respectively; and that all and every such exchange and exchanges so to be made should be good, valid and effectual in the law to all intents and purposes whatsoever: Provided, nevertheless, that no exchange should be made of any lands, tenements or hereditaments, held in right of any church or chapel, or other ecclesiastical benefice, without the consent, testified as aforesaid, of the patron thereof, and of the lord bishop of the diocese in which such lands, tenements or hereditaments, so to be exchanged, should be situated. And it was further enacted, that nothing therein contained should extend to revoke, make void, alter or annul any will or settlement; but that the person or persons to whom any lands, grounds, or hereditaments should be allotted or given in exchange by virtue of that act, should be seised thereof to such and the same uses, and for such and the same estates, and subject to such and the same wills, jointures, rents, charges, and incumbrances, and no other, as the messuages, cottages, lands, grounds, and hereditaments, whereof such person or persons was seised or possessed at or immediately before the execution of the award of the said commissioners, or for which or in respect whereof such allotments or exchanges should be made, would have been subject to, charged with, or affected by, in case the said act had not passed.

1814. *Samuel Hunt* died.

1820. The commissioners, pursuant to the directions of the General Inclosure Act (*a*), executed their award in writing under their hands and seals, dated the said 14th day of July, 1820; and they thereby awarded and allotted

(*a*) 41 *Geo.* 3, c. 109, ss. 35, 37.

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amongst other things, unto and for the plaintiffs in the said award, described as devisees of the said *Samuel Hunt*, deceased, in lieu of and as compensation for their copyhold, open field lands, rights of sheepwalk, rights of common, and an old inclosure given up by them the said plaintiffs, to be allotted by the said commissioners in exchange, (all of which were copyhold of the manor of Kennett-within-Kentford,) two several allotments of land, therein particularly described, containing respectively 21A. 3R. 37P. and 90A. 1R. 10P.

The plaintiffs agreed to sell the two allotments made to them to the defendant.

The question for the opinion of the Court is, whether the plaintiffs can make a good title to these allotments.

Preston, for the plaintiffs. The objection raised against the title is, that the award of the commissioners is bad. [*Bayley*, J. Suppose this is an old inclosure, the commissioners had no power to award it in exchange.] It is another question whether the award is void in toto. The objection amounts to this, that the commissioners had not power to make an allotment to the plaintiffs in lieu of old inclosures. But the plaintiffs ought not to be in a worse condition than if an allotment had been made to them in respect of their common rights, without reference to old inclosures; and supposing the allotment to have been too large if the old inclosure is excluded, the parties injured by such excess should have appealed, on the ground that the allotment was larger than the plaintiffs were entitled to in respect of their common rights. The award is final against those who, having the power of appealing, neglect to take that course. It would be contrary to all justice to contend, that if one part was not duly allotted, and other parts were well allotted, the whole should fall to the ground. It is true that in *Cooper* v. *Thorpe* (*a*), Sir *Thos. Plumer*, M. R., was of opinion that an award under an inclosure act, if bad

(*a*) 1 Swanst. 105.

in part, was bad altogether; but in *Rex* v. *Washbrooke* (*a*) it was considered by *Bayley*, J., and not denied by the rest of the Court, that the award of commissioners appointed to fix and ascertain the boundaries of a parish, as well as to allot common fields, might be bad as to their ascertainment of the boundaries, without affecting that part of the award which related to the allotment. This award is not to be construed strictly. In *Rich* v. *Clarkson* (*b*) it was held, that no technical form is necessary in awards under inclosure acts, but that it is sufficient if the commissioners *substantially* pursue the power with which they are entrusted. If this was a mistake of the commissioners, and no such exchange could be legally made by them, that part of the award may be rejected as surplusage. The Court will not, upon this trifling error, overset an award upon which the rights of 500 persons depend. If any person's rights are improperly dealt with by this award, he has his remedy by injunction (*c*). That would be the proper mode of disposing of the question consistently with the justice of the case. By setting aside this award, the titles in all districts where inclosures have taken place would be unsettled.

Rolfe, contrà. The defendant having contracted to purchase from the plaintiffs an estate, constituting one entire property, are advised to take the objection that the award is not authorized by the act. It is plain, upon the facts stated, that no title can be made to these allotments. The plaintiffs have no title, unless the statute, and the award purporting to be made in pursuance of the statute, confer that title. Though this award is made by commissioners having somewhat of a public character, it can be regarded no otherwise than as the award of private individuals. So long as the commissioners obey the directions of the act, their award is final; but here they have made an allotment which the act did not authorize them to make.

(*a*) 7 Dowl. & Ryl. 221; 4 Barn. & Cressw. 732.

(*b*) 2 W. Bla. 318.

(*c*) It seems difficult to consider that as a good title which requires an injunction to support it.

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The act gave them no power to adjudicate upon the rights of the proprietors; and if *Hunt* had brought an ejectment for the land taken away from him by the award, the action could not have been defended. If the parties in possession of the old inclosure were to allege that the commissioners had awarded the land to the defendant, the answer on the part of *Hunt* would have been, that the commissioners had no authority to make such allotment. If *Hunt* or his devisees could maintain ejectment for the old inclosure, it is clear that the plaintiffs can have no title to the allotment in lieu of such old inclosure. If the benefit intended to be given to one party is void, the equivalent must be also void. In *Pope* v. *Brett* (*a*), where the award was that *Pope* should be paid and satisfied by *Brett the money due and payable* to *Pope* as well for task work as for day work, and that *Pope* should pay to *Brett* 25*l.* in full satisfaction of all demands, and that mutual releases should be executed, the award was held to be void in toto, for not expressing how much was to be paid for the task work.

There is no authority given by the act to allot old inclosures, except under the exchange clause. But this allotment to the devisees of *Hunt* is not really an exchange,—which is where each of two parties gives his own, and receives something from the other,—but it is an allotment for and in consideration of something brought into the mass.

Then the exchange clause directs that all such exchanges shall be ascertained, specified and declared in and by the award, and requires the consent of the owners. Here the award does not shew how much the devisees take by way of exchange, and how much as an allotment in respect of

(*a*) 2 Saund. 292. And see *Ingram* v. *Rouche*, H. 18 *E.* 4, fo. 22, pl. 3, and M. 19 *E.* 4, fo. 1, pl. 1; *Wilmer* v. *Oldfield*, 1 Leon. 304; *Oldfield* v. *Wilmore*, Owen, 153; *Samon* v. *Pitt*, 1 Roll. Abr. 85, (translated 3 Vin. Abr. 85;) *Barney* v. *Fairchild*, ibid.; *Munday* v. *Smith*, ibid.; *Birks* v. *Trippett*, 1 Saund. 32; *Veale* v. *Warner*, ibid. 324 (2); *Hodsden* v. *Harridge*, 2 Saund. 64; *Coppin* v. *Hurnard*, ibid. 127; *Cooke* v. *Whorwood*, ibid. 337.

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Hunt's rights of common. Then the consent of the respective owners does not appear on the face of the award. This omission is fatal, because the parties may be persons under disability, who, if the consent required by the statute has been given, may have their remedy against parties from whom such consent may have been improperly obtained, and who, on the other hand, may, if such consent has not been given, step in at a future period, and assert their rights against the allottees and those claiming through them. The Court will not presume consent in support of the imperfect exercise of a limited authority. The difficulty which presses upon the plaintiffs has long been felt; and in several acts for inclosing lands in the neighbouring county of Suffolk (*a*), clauses have been introduced for the purpose of obviating the difficulty. The present is an attempt to avoid the necessity of introducing such clauses.

Preston, in reply. The plaintiffs do not rely on the exchange clause. This is different from the case of an award made between two parties. Who is to impeach the plaintiffs' title? If the Court can see enough upon the face of the award to support it, they will do so. Here the commissioners say that they make the allotment in respect of two things; in respect of one of which the allotment might be lawfully made: the Court will therefore presume that the allotment was so made. [*Parke*, J. It is much the same thing as if it was given for land, and a hundred pounds paid down. It does not appear that there was a power of appeal.] A power of appeal is given by this act, though not stated in the special case. If this objection prevails, the award must be void in toto. [*Parke*, J. Why may not the exchange have been made, though not duly stated on the face of the award? Lord *Tenterden*, C. J. The commissioners say there has been an exchange,—why should we say there has not?]

Cur. adv. vult.

(*a*) Barton Mills, Farnham, Freckingham, Higham, Icklington, Risby, Warlington.

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The following certificate was afterwards sent:—

"This case has been argued before us by counsel. We have considered it, and are of opinion that the plaintiffs cannot make a good title to the allotments therein mentioned.

TENTERDEN.
J. BAYLEY.
J. LITTLEDALE.
J. PARKE."

15th May, 1830.

DOE dem. EVANS and others v. JONES and others.

Although a preacher at an endowed meeting-house have such an interest in the office and its emoluments as will entitle him to a mandamus if disturbed in the use of the pulpit, he has not such a legal interest in the endowment as will entitle him to retain possession against the trustees of such endowment.

EJECTMENT for a chapel, dwelling-house, and stable, in the parish of Llanwchllyn, in the county of Merioneth.

At the trial at the Great Session for Merioneth, held at Bala, before Mr. Justice *Raine*, on the 14th of April, 1830 (*a*), the following facts appeared. By lease and release of the 4th and 5th August 1783, the release being between *John Kenrick* and *Lewis Rees*, clerk, of the one part, and *Benjamin Jones* and nine other persons, being ministers of ten dissenting congregations, of the other part; *Kenrick* and *Rees*, who were therein described as surviving trustees, granted, bargained, sold and released, unto the said *Benjamin Jones* and the nine other ministers, *and their heirs*, all that piece or parcel of ground, with the building thereon erected, &c.; *habendum* unto the said *Benjamin Jones* and the nine others, *and their successors, ministers of the said respective meeting-houses aforesaid* for the time being, in conjunction with the said *Kenrick* and *Rees*, during their lives, and the life of the survivor of them for ever: in trust and to the intent and purpose that the said structure or building should be used as a meeting-house, place or house for the public and religious worship and service of God, by the society or congregation of Protestant dissenters,

(*a*) Counsel for the plaintiff, *Cockerell* and ——; for the defendant, *Whyatt, Attorney-General*, and *Williams*.

commonly called Presbyterians, and that they should permit and suffer the same from time to time (so long as the laws of the land would admit) to be so used, occupied and engaged by such society or congregation as aforesaid, and for no other use, intent, or purpose whatsoever. The first lessor of the plaintiff was the heir at law of the survivor of the ten trustees, to whom the property in question was conveyed by the deeds of the 4th and 5th August, 1783. The defendant *Michael Jones* had been for some years, and still was, the minister of the chapel. Possession had been demanded on behalf of the lessors of the plaintiff, before the day of the demise laid in the declaration. On the part of the defendants it was urged, that the habendum to the ten relessees and their *successors*, only passed a life estate, and that consequently nothing descended to the lessor of the plaintiff, as heir of the surviving relessee; and, secondly, that the defendant, *Michael Jones*, as minister of the chapel in possession, had a legal title to retain that possession whilst he continued minister. The learned judge overruled both these objections, but gave the defendant leave to move to enter a nonsuit.

Campbell now moved according to the liberty reserved. The first question is, whether the ten trustees took an estate in fee under the conveyance of 1783. There is a discrepancy between the premises and the habendum. The premises are to the relessees *and their heirs*, whilst the habendum is to them *or their successors*. As these persons could not take by succession, the habendum gave only a life estate. In *Baldwin's* case (*a*), where the premises were "to the said *Ann*, and *Anthony Baldwin* her son, and the heirs of the said *Anthony*, habendum to them from the date of the said indenture until the end of 99 years, and so from 99 years to 99 years, until 300 years be expired," the habendum was held to be repugnant and void. In the Earl of *Rutland's* case it is said (*b*), that it was resolved in

(*a*) 2 Coke's Rep. 23 b. (*b*) 8 Co. Rep. 56 b.

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auditor *King*'s case, that where Queen *Elizabeth* granted a manor to *B.* and his heirs, (in the premises of the letters-patent,) to have and to hold the said manor to *B.* and his assigns, leaving out heirs in the habendum,—the fee of the manor passed by the premises, and the habendum was void. But in *Altham*'s case (*a*) it is said, that if a man gives land to one and his heirs, habendum to him and the heirs of his body, he shall have but an estate tail, *Com. Dig.* Fait (E. 9, 10;) this looks the other way. [*Bayley* J. Where the premises limit an estate which the law will allow, and the habendum limits an estate which is not allowed by law, the habendum is void; the habendum will not control the premises where it is repugnant and cannot take effect.] The weight of authority is certainly against this objection, and therefore I will give the Court no further trouble upon it.

The second objection involves a point of great importance; namely, whether the right of possession is in the minister or in the trustees. The objection to the defendant, *Michael Jones*, was, that his doctrine was not orthodox, but no proceeding had been taken to oust him from his office, and the question therefore is, whether a trustee can maintain ejectment against a person who is in possession of the office, and is entitled to the office. [*Bayley* J. You call it an office?] It is an office coupled with an interest. It is so described in *Rex* v. *Barker* (*b*), in which case a mandamus issued to restore a dissenting minister who had been removed. That case shews, that whilst he holds the office he has the possessory title. Where a master allows a servant to inhabit a house as part of his wages, he cannot bring an ejectment to turn him out of possession whilst he continues in the service. The mandamus in *Rex* v. *Barker*, (of which the defendant has obtained a copy from the Crown Office,) commands the parties to whom it is addressed, to admit the minister to the use of the pulpit, with all the liberties, privileges, pro-

(*a*) 8 Co. Rep. 154 b. (*b*) 3 Burr. 1265.

fits and advantages belonging to the same (*a*). In that

(*a*) The writ was in the following form:

"Of Easter term, in the third year of King *George* the Third.

"Plymouth. *George* the Third, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, &c.

"To *Pentecost Barker*, *Richard Dunning*, *Philip Cockey*, and *Elias Lang*, and to every of them, greeting. Whereas *Christopher Mends* was duly nominated, elected and chosen into the *place and office* of a pastor, minister, or preacher in a certain meeting-house appointed for the religious worship of Protestant dissenters, commonly called Presbyterians, in Plymouth, in Our county of Devon: And whereas he, the said *Christopher Mends*, by virtue of such nomination, election and choice, ought by you to be admitted to the use of the pulpit in the said meeting-house, for the due performance of his function, well and faithfully to execute the said place and office, and to have, use, and enjoy all privileges, profits and advantages of and belonging to the said place and office: And whereas he, the said *Christopher Mends*, after such his nomination, election and choice, did, in due manner, desire and request to be admitted to the use of the pulpit in the said meeting-house: Yet you, well knowing the premises, but not regarding your duty in this behalf, have absolutely neglected and refused, and still do absolutely neglect and refuse, without any reasonable cause whatsoever, to admit the said *Christopher Mends* into the said place and office, and to the use of the pulpit in the said meeting-house, and have unjustly obstructed him, the said *Christopher Mends*, in the due performance of the duties of the said pastorship, and have unjustly prevented him from enjoying the use of the said pulpit, and from performing the duties of the said pastorship,—in contempt of Us, and to the great damage and grievance of him the said *Christopher Mends*, and also of divers others of Our liege subjects, being dissenters, commonly called Presbyterians, dwelling and residing in and near Plymouth aforesaid,—as We have been informed from their complaint made to Us in that behalf. We, therefore, being willing that due and speedy justice should be done in this behalf, (as it is reasonable,) do command you, firmly enjoining you, that immediately after the receipt of this Our writ, you do, without delay, peremptorily admit, or cause to be admitted, him, the said *Christopher Mends*, to the use of the pulpit in the said meeting-house, as pastor, minister, or preacher there, together with all the liberties, privileges, profits and advantages belonging to the same. And in what manner you shall have executed this Our writ, make appear unto Us at Westminster, on Monday next after the Morrow of the Ascension of our Lord, then returning to Us this Our writ. And this you are not to omit on peril that may fall thereon. Witness, *William* Lord *Mansfield*, at Westminster, the 28th day of April, in the 3d year of Our reign.

"By the Court,

"*Burrow*."

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case Lord *Mansfield* says (*a*), that since the Act of Toleration, the writ of mandamus ought to be extended to protect an endowed pastor of Protestant dissenters from analogy, and the reason of the thing. The deed is the foundation or endowment of the pastorship; the form of the instrument is necessarily by way of trust, for the meeting-house, and the land upon which it stands, could not be limited to the minister and his successors. Many lectureships, and other offices, are endowed by trust-deeds. The right to the function is the substance, and draws after it every thing else as appurtenant thereto. The powers of the trustees is merely in the nature of an authority to admit. The use of the meeting-house and pulpit in this case follows, by necessary consequence, the right to the function of minister, preacher, or pastor, as much as the insignia do the office of a mayor, or the custody of the books, that of a town clerk. This shews, that if the minister is duly appointed, and is not admitted, the Court will grant a mandamus to admit; *à fortiori*, they will grant a mandamus to restore. [*Parke* J. The mandamus to admit to the use of the pulpit is perfectly consistent with this, that the land and chapel should be in the possession of the trustees. *Bayley* J. If the argument could be supported, the minister would have a right to dispose of the whole of the pews at his pleasure. Lord *Tenterden*, C. J. In the case of an endowed lectureship, though there is a right to the pulpit, there is no right to the possession of the church.]

BAYLEY J.—We are not called upon to decide whether defendant is entitled to the pulpit or not.

PARKE J.—The defendant is only tenant at will; his remedy may be in equity.

Rule refused.

(*a*) 3 Burr. 1268.

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WILLIAMS and Wife *v.* GOODTITLE, Lessee of DAVID, in Error.

ERROR upon a judgment in the Court of Great Session, in the county of Glamorgan, upon a special verdict in ejectment, in an action of ejectment on the demise of *John David* against *Rees Williams* and *Elizabeth* his wife, for the recovery of five messuages, five dwelling-houses, &c., situate and being within the franchise of the town of Swansea, in the county of Glamorgan. The verdict stated that before the making of the demise, and before the committing of the trespass and ejectment mentioned in the declaration, to wit, 24th April, 1795, *David Thomas* made his last will and testament in writing, duly executed and attested to pass real estates according &c., in the words following: that is to say,—"In the name of God—Amen. I, *David Thomas*, of &c. do make, publish and declare this my last will and testament in manner following: that is to say, I do give and devise unto my friends and acquaintance *John Hubbakuk*, of &c., and *Thomas Jones*, of &c., their heirs and assigns, all that messuage &c., situate &c., to hold the same unto said *Hubbakuk* and *Jones* and their heirs, to the use of *Hubbakuk* and *Jones*, during the life of my wife *Elizabeth Thomas*: yet, nevertheless, to permit and suffer my said wife and her assigns to receive and take the rents, issues

A. devised a messuage to *B.* for life, and after other devises, devised all the residue of his real estate to *B.* and his heirs. Afterwards *A.*, having purchased other lands, made this codicil: "Whereas I did, by my last will and testament, bearing date, &c., devise all the real estate *I was then possessed of* in manner therein mentioned, and which will I ratify and confirm:" —Held, that the after-purchased lands passed by the codicil (*a*).

(*a*) Quod mirum videtur. By 1 *Vict.* cap. 26, s. 3, it is enacted, "That it shall be lawful for every person to devise, bequeath or dispose of, by his will, executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator, and that the power hereby given shall extend to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will." And by s. 24 it is enacted, "that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, *unless a contrary intention shall appear by the will.*" Notwithstanding the decision in the principal case, it would rather appear that even this enactment would not have given the effect to the codicil contended for on the behalf of the lessor of the plaintiff, inasmuch as a *contrary intention* might, it is conceived, be said to appear from the recital in the codicil, that recital expressly referring to the real and personal estate of which the testator was possessed at the time of the making of the original will.

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and profits thereof, to her and their own proper use and benefit, and after her decease to the use of the said *Hubbakuk* and *Jones* and their heirs, and the survivor of them, upon trust to lay out and expend a moiety or one half part of the rents and profits of my said hereditaments and premises towards the support, maintenance, education, and advancement in life of my nephew, *John Evans*, until he shall arrive at the age of twenty-one years; and the other moiety thereof towards the support, maintenance, education, and advancement in life of my nephew, *Job Phillip*, until he arrives at the age of twenty-one years; and in case either of my said nephews shall happen to die before he arrives at the age of twenty-one years, without leaving any lawful issue of his body, then in trust to lay out the moiety of him so dying at interest, to accumulate for the benefit of the survivor of them, or to lay out the same towards his maintenance and education, at the discretion of my said trustees and their heirs, and the survivor of them, until the survivor of them my said nephews shall have attained the age of twenty-one years; and if it shall happen that either of my said nephews shall die before his arrival at the age of twenty-one years, leaving lawful issue of his body, then and in such case the moiety of the rents and profits of him so dying to be applied towards the support, maintenance and education of the heirs of his body, in like manner as is hereinbefore directed respecting my said two nephews, until their arrival at the age of twenty-one years, and from and after the arrival of the survivor of them my said nephews at that age, then to the use and behoof of such survivor, his heirs and assigns; and in case both of my said nephews shall attain to their respective ages of twenty-one years, then to the use and behoof of the said *John Evans* and *Job Phillip*, as tenants in common and not as joint tenants, for and during their respective natural lives; and from and after their respective deceases, to the use of the respective heirs of their bodies lawfully issuing, as tenants in common and not as joint tenants; but if the said *John Evans* shall

die without leaving any lawful issue, then I give and devise all and singular the said hereditaments to the said *Job Phillip* and his heirs; and if the said *Job Phillip* shall die without leaving any issue, then I give and devise the said hereditaments unto the said *John Evans* and his heirs. And I do hereby give and devise all that messuage situate in High Street, &c., and also a house adjoining, fronting the Back Lane, with the appurtenances, in as large and ample a manner as I purchased the same of the said *C. R. Jones* and others, together with all erections and buildings thereon built, or hereafter to be built, unto my said dear wife *Elizabeth*, for and during her natural life; and after her decease I give and devise the same to *John Adams*, the nephew of my said wife, and the heirs of his body lawfully issuing; and for want of such issue I give and devise the same to such and so many of the sisters of him, the said *John Adams*, as shall survive him, as tenants in common and not as joint tenants, and to their respective heirs. *And I do hereby give and devise all the rest of my real estate, whatsoever and wheresoever situate (not hereinbefore particularly devised) unto my said dear wife, Elizabeth Thomas, and her heirs.* And I do hereby give and bequeath all and singular my personal estate, whatsoever and wheresoever, and of what nature or kind soever the same may be, unto my dear wife, *Elizabeth Thomas*, her executors, administrators and assigns, absolutely for ever, subject nevertheless to the payment of two pounds and ten shillings yearly, towards the support, maintenance and education of *Elizabeth Thomas*, the daughter of my brother *Thomas Thomas*, until she shall arrive at the age of fifteen years, and no longer. And I do hereby nominate, constitute and appoint my said dear wife, *Elizabeth Thomas*, sole executrix of this my last will and testament. In witness," &c.

The special verdict further stated, that afterwards, and before the said several times in the said declaration respectively mentioned, and also before and at the times of the making of the indentures of lease and release hereinafter

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mentioned, *C. R. Jones*, Esq., was seised in his demesne as of fee of three messuages, situate and being in Greenhill, within the franchise of the said town of Swansea, in the county of Glamorgan, and also of a certain close, situate and being within the said franchise: one of which messuages is one of the dwelling-houses in the said declaration mentioned, and is described in the codicil hereinafter mentioned as an old thatched house or cottage; and that the said *C. R. Jones*, being so seised, did, by indentures of lease and release, bearing date respectively 15th and 16th March, 1799, and made between the said *C. R. Jones* and others, of the one part, and the said *David Thomas* of the other part, for the consideration in the said indentures respectively mentioned, grant, release and convey to the said *David Thomas* and his heirs the said three messuages and the said close, by virtue of which indentures, and by force of the statute made, &c., the said *David Thomas* became and was seised as of fee of the said three messuages and the said close, and being so seised, did afterwards, and before the date of the indenture of lease hereinafter next mentioned, erect and build on the said close a certain messuage, meeting-house or chapel, called, &c., being one of the said messuages in the said declaration mentioned, and did also erect, build and make thereon all the residue of the dwelling-houses &c. in the said declaration further mentioned, and also several other messuages and dwelling-houses, making altogether the *sum* of the houses so erected and built by the said *David Thomas*, together with the said three messuages thereinbefore first mentioned, greater in number than the *sum* of the houses in the said declaration mentioned, together with the six houses by the codicil hereinafter mentioned specifically devised to *Jane Phillip*, *Elizabeth Thomas* and *Elizabeth Lloyd*.

The special verdict further stated, that afterwards, and before the several times in the said declaration mentioned, to wit, on the 21st day of December, 1802, the said *David Thomas*, being so seised of the said close and of all the

said several dwelling-houses, messuages, &c. with the appurtenances, whereof all the said several tenements, with the appurtenances in the said declaration mentioned, are parcel, did, by indenture of lease bearing date the day last aforesaid, demise and grant unto *Ebenezer Morris* and four others the said messuage, meeting-house or chapel, called, &c., to hold to them for the term and upon the trusts recited of and concerning the same in the said codicil hereinafter mentioned; and that the said last-mentioned lease was not made or inrolled according to the provisions of the statute passed in the 9th year of the reign of King *George* 2, intituled "An act to restrain the disposition of lands, whereby the same become unalienable."

The special verdict further stated, that afterwards, and before the times mentioned in the declaration, to wit, 4th June, 1803, the said *David Thomas*, being so seised as aforesaid, made a certain codicil to his said last will and testament, the said codicil being duly executed and attested to pass real estates, according to the form, &c., in the words following: that is to say, "I, *David Thomas*, of &c., do make and publish this present codicil, which I hereby declare to be, and order and direct to be, taken as and for part of my last will and testament, as follows:— Whereas I did, by my last will and testament in writing, duly executed and attested, bearing date the 24th day of April, 1795, give, devise and bequeath *all the real* and personal *estate I was then possessed of, in the manner therein mentioned*, and *which will I do hereby ratify and confirm*. And whereas, since the date and execution of the said will, I purchased of *C. R. Jones*, Esq., and others, three messuages, situate in Greenhill, within the franchise of the town of Swansea, together with the close adjoining to the back part of the said houses, and which were conveyed to me by indentures of lease and release of 15th and 16th March, 1799; and whereas, since the date of the said indentures of lease and release, a certain meeting-house or chapel, known by the name, &c., and several dwelling-houses or cottages,

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have been erected and built on the said hereditaments and premises; and whereas, by indenture of lease bearing date the 20th day of December last, I demised and granted the said meeting-house or chapel unto *Ebenezer Morris*, of &c., minister of the Gospel, *D. R.* of &c., *H. B.* of &c., *D. F.* of &c., and *J. S.* of &c.; to hold unto them and the survivor and survivors of them, and to the person or persons who should from time to time be nominated and appointed, as is therein set forth, trustee or trustees in the room or stead of any or either of them, from the 25th day of December then next, for the term of 999 years, upon the trust and confidence; and the said lessees, and the survivor or survivors of them, and the several and respective person or persons who should from time to time be nominated and appointed, as is thereinafter mentioned, trustee or trustees in the room or stead of any or either of them, from time to time and at all times during the said term, if the law and statutes of this realm would admit, should and would permit and suffer the said meeting-house to be used, occupied and enjoyed as and for a place or house for the worship of God by the church society or congregation of Protestant dissenters, called or known by the name of Methodists, and by such others as should thereafter attend the worship of God in that place, at the rent of one penny, subject to the several clauses, provisoes and agreements therein contained:—Now I do hereby give and devise all and singular the hereditaments and premises, so purchased by me of *C. R. Jones* and others as aforesaid, and all erections and buildings thereon erected and built, and all the rents, issues, and profits thereof, unto my dear wife *Elizabeth Thomas*, for and during the term of her natural life, subject nevertheless to the said last-mentioned indenture of lease; and from and immediately after the decease of my said dear wife, I give and bequeath the two new-built dwelling-houses or cottages, and one old thatched house or cottage (adjoining the said meeting-house or chapel), now in the several tenures or occupations of &c., together with such gardens as shall

belong thereto respectively at the time of my said wife's decease, unto my friends and brethren in the Lord, the said *Ebenezer Morris*, *D. R.*, *H. B.*, *D. F.*, and *J. S.*; to hold the said three dwelling-houses or cottages and gardens, from the decease of my said wife, unto them and the survivors or survivor of them, and unto the several and respective persons or person who shall from time to time be nominated and appointed trustees for the said chapel or meeting-house, for and during and unto the full end and term of 999 years; in trust, nevertheless, that my said trustees, and the survivors and survivor of them, and their successors as aforesaid for the time being, shall and do, from time to time, lay out the net rents, issues and profits of the said three dwelling-houses or cottages and gardens towards the support of the said chapel or meeting-house, for and during the residue and remainder of the term thereof granted, or other sooner determination of the said lease, by forfeiture or otherwise. And I do hereby give and devise unto *Jane Phillip* all those two dwelling-houses or cottages (other part of the premises so purchased by me as aforesaid), adjoining &c., at Greenhill aforesaid, together with such gardens as shall belong to the same at the time of my said wife's decease, and which cottages are now in the several tenancies or occupations of &c.; to hold the said two last-mentioned cottages and gardens, from the time of the decease of my said wife, unto her the said *Jane Phillip* and her heirs. And I do hereby give unto my niece, *Elizabeth Thomas*, the daughter of my brother *Thomas Thomas*, all those two other dwelling-houses or cottages, other part of the said premises, adjoining, &c., together with such gardens as shall belong to the same at the time of my said wife's decease, and which two last-mentioned cottages are now in the several tenures or occupations of &c.; to hold the said two last-mentioned cottages and gardens, from the time of the decease of my said wife, unto the said *Elizabeth Thomas* and her heirs. And I do hereby give and devise unto my said wife's niece, *Elizabeth Lloyd*, all those two

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other dwelling-houses or cottages (other part of the said premises), adjoining the said cottages devised to my said niece *Elizabeth Thomas*, together with such gardens as shall belong to the same at the time of my said wife's decease, and which two last-mentioned cottages are now in the several tenures or occupations of, &c.; to hold the said two last-mentioned cottages and gardens, from the decease of my said wife, unto the said *Elizabeth Lloyd* and her heirs. In witness, &c."

The special verdict then stated the death of *David Thomas* on 19th July, 1814, leaving his niece (the defendant) *Elizabeth Williams*, then *Elizabeth Thomas*, his heir at law,—her marriage with *Rees Williams*,—that *Elizabeth Thomas*, the widow, entered, and died seised, leaving the lessee of the plaintiff her heir; and that afterwards, and before the demise in the declaration, the defendants entered and were possessed. The verdict then finds the demise, entry and ouster in the declaration. The record then states the judgment pronounced by *Clarke*, C.J., and *Casberd*, J., in favour of the plaintiff below (*a*).

Upon this judgment the common errors were assigned (*b*).

Taunton, for the plaintiffs in error. The only question is, whether, by the codicil, the will was re-published as to

(*a*) The argument below (before *Nolan* and *Casberd*, Js., at Cardiff, 11 Sept. 1827, and 14 April, 1828,) was on a special case reserved at the trial, with liberty to turn it into a special verdict. Judgment being pronounced in favour of the plaintiff below (by *Clarke*, C. J., Presteign, 13 August, 1828), time was given to the defendants to consider whether they would avail themselves of the liberty given to turn the special case into a special verdict. The opinions of *Tindal*, S.G., *Hart*, *Bell*, and *Spence*, were taken, and as they all concurred in thinking that the lands in question did not pass to the widow, a special verdict was prepared, on which, without further argument below, judgment was entered for the plaintiff.

(*b*) In the margin of the error books it was stated that the question intended to be raised was, whether the codicil was such a republication of the will as to extend the operation of the residuary devise to the after-purchased estates, so as to pass the chapel and the three messuages.

the after-acquired lands, not disposed of by the codicil. The interest not disposed of by the codicil consisted of a reversion after a term of 999 years, and of some other property devised to the wife for life. The lease for 999 years was not duly inrolled according to the statute. Consequently, the term thereby created was null and void. The lease therefore fastened itself on the undisposed reversion. On the part of the plaintiffs in error it is submitted that this property did not pass, upon two grounds. First, the testator, by the codicil, specifically ratifies the residuary clause in the will as to the estate of which he was possessed at the time he made the will. This amounts to an exclusion of property acquired since. Secondly, the devise of a particular estate to the wife confirms that construction as to the first part. It may be admitted that where a testator gives a limited interest, and makes the same devisee devisee of the whole, he is not shut out from the benefit of the residuary clause by reason of the devise of the life estate; *Ridout* v. *Pain* (*a*); but this being a mere question of intention, the devise to the wife shews that that was all the interest that she was to take. With respect to the question of re-publication, the history of the law seems to be this. Before the Statute of Frauds, there might be a re-publication by parol. In the earlier cases after the statute, it was held that there could be no implied re-publication; *Lytton* v. *Viscountess Falkland* (*b*), *Penphrase* v. *Lord Lansdowne* (*c*). In *Acherly* v. *Vernon* (*d*) a new rule was adopted for the first time, which has been the leading and governing rule ever since, subject to some qualifications. It is curious to trace the alteration of the law. The general rule now is, that the codicil brings down the will to its own date; *Goodtitle* v. *Meredith* (*e*). *Acherly* v. *Vernon* has certainly been

(*a*) 3 Atk. 486.
(*b*) 1 Comyns's Rep. 383; 8 Vin. Abr. 165.
(*c*) Ibid. 384; 8 Vin. Abr. 164.
(*d*) 9 Mod. 78; 1 Comyns's Rep. 381.
(*e*) 2 Maule & Selw. 5.

1830.

WILLIAMS v. GOODTITLE.

considered as establishing the rule laid down by Lord *Ellenborough* in *Goodtitle* v. *Meredith*. But the language of the codicil in *Acherly* v. *Vernon* is prospective, and the terms used are very peculiar. The case, however, has since been accepted, not as turning on any particular circumstances, but upon the general grounds laid down by Lord *Ellenborough*. In *Barnes* v. *Crowe* (*a*), Lord Commissioner *Eyre* remarks on the effect of prospective words, intended to operate wholly upon after-acquired lands. It is now too late to contend against the general rule which, in *Pigot* v. *Waller* (*b*), Sir *Wm. Grant*, M. R., admits and regrets. But the plaintiffs in error rely upon the authorities which engraft a material exception upon the rule now received; *Heylyn* v. *Heylyn* (*c*); namely, that where the intent of the testator in the codicil clearly is to pass only such property as was disposed of by the will, the after-acquired property is virtually excluded. [*Bayley*, J. And the will must have words sufficiently ample to pass the after-acquired lands.] Here the codicil is tied up by the particular words used. It contains an express declaration that the intention of the testator was to ratify the will in respect of the lands which he possessed at the time at which that will was made. If the codicil had ended with the first clause, the evidence of intention would have been sufficiently strong; but here the testator goes on to recite the purchase of the very property from *Jones*, and to make a particular disposition of it. The plaintiffs in error rely principally upon the case of *The Countess of Strathmore* v. *Bowes* (*d*). There Lord *Kenyon* stopped the counsel (*e*) who was to have argued against the operation of the codicil upon the newly purchased lands; and the opinion of this Court was afterwards confirmed in the House of Lords (*f*), though Lord *Thurlow* certainly dis-

(*a*) 1 Ves. jun. 486.
(*b*) 7 Ves. 98.
(*c*) Cowp. 130.
(*d*) 7 T. R. 482.
(*e*) *Erskine.*
(*f*) *Bowes* v. *Bowes*, 2 B. & P. 500.

sented, reading the codicil as if the word "all" had been there. [Lord *Tenterden*, C. J. Lord *Thurlow* imports the word "all;" it is not in 7 T. R.]

Reynolds, for the defendant in error. Where a codicil is such a re-publication as to make the will speak from the date of the codicil, the question is, not whether the testator meant to re-publish, but whether he has expressed an intention which would be defeated by such a construction of the act of re-publication.

Here he was stopped by the Court.

Lord TENTERDEN, C. J.—I can find no intention to exclude the after-purchased lands. Both these instruments are to be read as of the date of the codicil.

It is admitted that if all this had stood in one will, the lands would have passed. The words—"I did give all the real and personal estate I was then possessed of"—rather seem to indicate an intention that the lands should pass.

BAYLEY, J., and LITTLEDALE, J., concurred.

PARKE, J.—It is clearly to be taken as one instrument.

Judgment affirmed (*a*).

(*a*) But in *Monypenny* v. *Bristow*, 2 Russell and Mylne, 117, it appears to have been held, that where a codicil in its dispositive part, is applicable solely and expressly to the property previously devised by the will, such codicil has not the effect of re-publishing the will, so as to carry after-purchased property, notwithstanding a more general intent indicated in a recital contained in such codicil. And see *Hulme* v. *Heygate*, 2 Merivale, 128; *Guest* v. *Willasey*, 2 Bingh. 429; 10 B. Moore, 228; 3 Bingh. 614; 12 B. Moore, 2; *Gibson* v. *Rogers*, Ambler, 93; *Jackson* v. *Hurlock*, ibid. 487; *Attorney-General* v. *Downing*, ibid. 571; *Doe* d. *Pate* v. *Davy*, Cowp. 158; *Potter* v. *Potter*, 1 Ves. sen. 437; *Brown* v. *Higgs*, 4 Ves. jun. 709; *Parker* v. *Biscoe*, 8 Taunt. 699; 3 B. Moore, 24.

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BANKRUPT.

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2. In an action by assignees of a bankrupt, the defendant is entitled, under 6 *Geo.* 4, c. 16, s. 50, to set off a debt due to him from the bankrupt, if, when he gave credit to the bankrupt, he had no notice of a prior act of bankruptcy, though he had notice that the bankrupt had stopped payment. *Hawkins* v. *Whitten.* 219
3. Where a trader, after having obtained his certificate under three commissions of bankrupt, under none of which any dividend had been paid, was arrested for a debt contracted between the second certificate and the third bankruptcy, the Court refused to discharge him out of custody on filing common bail; and such third commission was said to be a nullity. *Fowler* v. *Coster.* 352
4. A trader does not commit an act of bankruptcy within 6 *Geo.* 4, c. 16, s. 3, by absenting himself, unless he absent himself from some place at which he would, in the ordinary course of his life and business, be expected to be found, or at which he has appointed to meet particular creditors. *Bernasconi* v. *Farebrother.* 364
5. A commission of bankrupt, describing the parties as "bankers, being traders according to the provision of the statute 6 *Geo.* 4, intituled, &c." is good, though they had ceased to be bankers before that statute passed, for the word "bankers" is descriptive of their persons only, and the word "traders" is a sufficient allegation that they were, as such, liable to the bankrupt laws. *Id.* *ibid.*
6. Such a commission may be supported by evidence of any species of trading carried on by the bankrupts after the passing of the statute. *Id.* *ibid.*
7. *A.*, having agreed to purchase an estate of *B.*, and having received the title-deeds, borrowed money of *C.*, and deposited the title-deeds with him as a security, agreeing to mortgage the estate to him whenever he should receive the deed of conveyance. *A.* afterwards received from *B.* the deed of conveyance of the estate, which he then delivered to *C.* as a further security. In the interval *C.* refused to complete the mortgage unless *A.* would pay usurious interest on the money lent, to which *A.* agreed. *A.* afterwards became bankrupt, and his assignees brought trover against *C.* for the deed of conveyance:—Held, that the original possession of the title-deeds being good, gave *C.* a right to the estate whenever it should be conveyed to *A.*, and therefore that *C.* was entitled to retain the deed of conveyance of the estate against the assignees of *A.* *Wood* v. *Grimwood.* 551
8. A mere order to deny a trader to a creditor, where no actual denial takes place, and no act of concealment is done, does not constitute an act of bankruptcy by beginning

to keep house with intent to delay creditors. *Fisher* v. *Boucher*. 589

9. A departing by a trader from his dwelling-house with the intention not to return if a given event occurs, which does not occur, whereupon the trader returns in the ordinary course, does not constitute an act of bankruptcy, by departing from the dwelling-house with intent to delay creditors. *Id. ibid.*

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2. The indorsee of such a bill, suing the acceptor, may, by comparison of the signatures, shew that the drawing and the indorsement are in the same handwriting. *Id. ibid.*

3. A set of foreign bills, drawn abroad, was sent to the drawer, (who was also the payee,) the defendant, who accepted two parts, and indorsed one to the plaintiff for value, prior to which the other had been indorsed by the defendant to his father *conditionally*, but who had never insisted on payment, but gave it up on the substitution of other securities:—Held, that the plaintiff was entitled to recover, and that the bill did not require a stamp: Held also, by Lord *Tenterden*, C. J., and *Parke*, J.—dubitante *Littledale*, J.—that it would have been the same if the first part had been indorsed and delivered *unconditionally*. *Holdsworth* v. *Hunter*. 393

4. A partial failure of consideration cannot be given in evidence in answer to an action by the drawer, or his legal representative, against the acceptor of a bill of exchange. *Obbard* v. *Betham*. 632

5. A boy was bound apprentice in 1827, by indenture, upon a premium of 30*l.*, which was agreed to be paid, and for which a bill was given. The indenture bore a 1*l.* stamp only. The apprentice served the master five months, when a difference arising between the master and the father, and it being discovered that the stamp was insufficient, the apprentice left the master. In an action by the indorsee against the acceptor of the bill,—Held, that as the apprentice had been maintained and instructed by the master for five months, and might have enforced a continuance of that maintenance and instruction by causing the indenture to be properly stamped, under 20 *Geo.* 2, c. 45, s. 5, there was not a total failure of consideration for the bill, and the action upon it was maintainable. *Mann* v. *Lent*. 660

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Where an action of trover, in which the damages are laid under 20*l.*, is removed by certiorari, by the defendant from an inferior into a superior court, without entering into a recognizance to pay the *debt* and costs pursuant to 7 & 8 *Geo.* 4, c. 71, s. 6, the plaintiff is entitled to a procedendo; and that, though the return to the certiorari has been filed. *Furnish* v. *Swann.* 452

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1. Old assessments to church rate are evidence upon a question of boundary, though the parish officers do not charge themselves with the receipt of the rate, otherwise than by crosses set against the names of the parties rated. *Plaxton* v. *Dure.* 1
2. The statute 59 *Geo.* 3, c. 12, s. 17, vests in the churchwardens and overseers of a parish *all* property belonging to such parish, whether applicable to the relief of the poor only, or to the purposes for which the church rate is made only; and whether originally vested in trustees for the benefit of the parish or not. *Doe* d. *Jackson* v. *Hiley.* 706

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See Bill of Exchange, 4—Evidence, 20.

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1. The lord of a manor is bound to admit the customary heir of a copyholder in fee, although there be a surrender to the use of a will, and a devise by the surrenderor, there being no claim of admittance on the part of the devisee. *Rex* v. *Wilson.* 140
2. So, although it appear, upon the return to a mandamus, that the non-claim of admittance, on the part of the devisee, is the result of a contrivance between him and the customary heir to deprive the lord of the fine which would be payable on the admittance of the devisee. *Id.* *ibid.*
3. In the case of a devise of copyhold surrendered to the use of the will, the estate descends upon the heir, subject to the contingency of being divested by the admittance of the devisee. *Id.* *ibid.*
4. Therefore, no disclaimer by the devisee is necessary to vest the estate in the heir. *Id.* *ibid.*
5. A copyhold may be disclaimed by parol, or by other matter in pais. *Id.* *ibid.*
6. *A.* and *B.*, joint tenants of a copyhold, make partition by parol without the consent of the lord, and afterwards occupy in severalty. *A.* surrenders to *C.* by general words. *C.* is not entitled to be admitted to the parcels occupied by *A.* in severalty. *Rex* v. *Southwood.* 414

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See EVIDENCE, 18—INSOLVENT, 1, 2—PLEADING, 6—PRACTICE, 2.

1. A plaintiff arresting for a larger sum than is legally due, though without malice, is liable to pay the defendant's costs under 43 *Geo.* 3, c. 46, s. 3. *Doulan* v. *Brett.* 29
2. Where a defendant is arrested without reasonable or probable cause, and the plaintiff recovers less than the sum sworn to, he is liable to costs, under 43 *Geo.* 3, c. 46, though no malice be shewn. *Day* v. *Picton.* 31
3. Where an indictment for felony is removed by certiorari, and tried at nisi prius, neither the judge at nisi prius nor this Court has authority to award costs to the prosecutor under 7 *Geo.* 4, c. 64, s. 22, whether the indictment be removed by the prosecutor or by the prisoner. *Rex* v. *Treasurer of City of Exeter.* 167
4. In trespass for turning plaintiff out of a room, per quod he was prevented from exercising his business of an attorney therein, if the plaintiff obtain a verdict for less than forty shillings, he is not entitled to full costs without a judge's certificate, under 22 & 23 *Car.* 2, c. 9, s. 136. *Daubney* v. *Cooper.* 325
5. Where *B.* commits a trespass on the land of *A.* by the direction and for the benefit of *C.*, and *A.* sues *B.* alone, the Court will not order *C.* to pay *A.*'s costs. *Berkeley* v. *Demery.* 442
6. Separate ejectments being brought by *A.* against *B.* and *C.*, tenants in possession respectively of parts, and *D.*, tenant in possession of the remainder of the premises sought to be recovered; and *D.*, claiming to be landlord of *B.* and *C.*, obtains a rule to consolidate the causes, the ejectments against *B.* and *D.* abiding the event of the trial of the action against *C.*: a verdict being found for *A.* against *C.*, the Court ordered *D.* to pay to *A.* his costs of the action tried, but refused to order him to pay the costs of the application to the Court. *Thrustout* d. *Jones* v. *Shenton.* 443

7. *Semble*, that *A.*'s proper course would have been to bring only one ejectment against the three,—or to move to set aside the appearance and pleas, unless *D.* would defend as landlord,—or to obtain a consolidation rule in which *D.* should have been directed to pay the costs in all the actions, in case a verdict should be found for the plaintiff. *Thrustout* d. *Jones* v. *Shenton*. 443

8. Under 43 *Eliz.*, c. 6, a judge may certify to deprive of his costs a plaintiff who recovers less than forty shillings, even where the defendant is privileged to be sued in the superior courts only; and, *semble*, where the defendant is not answerable to an inferior court, by reason of his not residing within the jurisdiction within which the cause of action arose. *Wright* v. *Nuttall*. 454

9. Where, in formedon, the demandant succeeded upon a demurrer to the replication, and obtained a verdict upon the trial of an issue in fact, and judgment was given thereon that he should recover his seisin against the tenant, and upon writ of error brought, the common errors were assigned, and judgment was affirmed:—Held, that the demandant was entitled to double costs under 13 *Car.* 2, c. 2, s. 10. *Cockerell* v. *Cholmeley*. 509

10. The 6 *Geo.* 4, c. 50, s. 30, applies only to cases where a verdict is actually found: therefore a defendant, who has moved for and obtained a special jury, is not entitled, under that section, to the costs of such jury, where the plaintiff either withdraws the record or is nonsuited; although the judge has certified that the cause was proper to be tried by a special jury. *Wood* v. *Grimwood*. 622

(But see 2 & 3 *Will.* 4, c. 42, s. 35.)

COUNTERMAND OF PAYMENT.

Where *A.* agrees to take certain goods of *B.* at a price, partly to be set against a debt due from *B.* to *A.*, and the residue to be deposited with *C.* for the purpose of being paid over to *D.*, when it should be ascertained in what sum *B.* is indebted to *D.*, it is not competent for *B.* to countermand the payment to *D.*; and until the account is taken, *C.* may hold the whole of such residue against *B.* *Bignell* v. *Ellis*. 165

COUNTY RATE.

1. A notice of appeal against a county rate, under 55 *Geo.* 3, c. 51, s. 14, must either state in express terms that the appellant is aggrieved by the rate, or state that from which it follows of necessity that he is so.

Therefore, such a notice of appeal, stating, as the ground of appeal, "that the county rate is unequal and defective, inasmuch as the appellant parish is charged and assessed in the rate at a higher proportion of the pound sterling, according to the fair annual value of the ratable property therein, than the respondent parish is charged and assessed in the rate, in proportion to the fair annual value of the ratable property therein," is defective and bad, for not going on to state in the words of the statute, "than has been fixed and declared by the justices of the county, in sessions assembled, as the basis of the rate;" for both parishes may have been valued too low, and yet the appellant parish may have no reason to complain with reference to the basis on which the whole rate was made.

And where, upon such defective notice, the sessions received evi-

dence of the annual value of the ratable property in both parishes, and amended the rate by altering the assessment upon the two parishes according to the annual value so proved, but left the statement of the annual value of both to remain as before:—Held, that they had acted without authority, and that their order must be quashed.

Semble, that the sessions might have corrected an inequality in the valuation of the ratable property in the two parishes, if the notice of appeal had been so framed as to authorize them to receive evidence upon that subject. *Rex* v. *Blackawton*. 695

2. Where (before the passing of the Municipal Corporation Reform Act, 5 & 6 *Will.* 4, c. 76,) the charter of a borough contained a non-intromittant clause, excluding the county magistrates, a rate in the nature of a county rate might have been enforced by the borough magistrates, under 55 *Geo.* 3, c. 51. *Mercer* v. *Davis*. 735

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See POLICY OF INSURANCE, 6.

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1. *A.* devises to *B.* for life, remainder to *C.* in fee, with power to *B.*, in case *C.* should die before *B.*, and *B.* should have no other child living at her death, to devise as she should think proper. *C.* survived *A.*, and died in the lifetime of *B.* The power of devising given to *B.* is a limitation in fee to her by way of executory devise during the life of *C.*, and upon the death of *C.* it becomes a vested remainder capable of being destroyed by fine. *Doe* d. *Harris* v. *Howell*. 24

2. Devise of lands to *A.* for life, remainder to the children of *B.* living at the time of *A.*'s death. *B.* left one daughter, who, with her husband, in the lifetime of *A.*, levied a fine to the use of *C.* The fine operates by estoppel only during the life of *A.*, but after *A.*'s death it operates upon the *estate*, vesting the right of possession in *C.* *Doe* d. *Christmas* v. *Oliver*. 202

3. *A.* devises land to *B.* and his heirs, but in case *B.* dies without heirs, then to *C.* and his heirs, or in case *B.* offers to mortgage or levy a fine, or suffer a recovery, upon the whole or any part thereof, then to go to *C.* and his heirs—*B.* and *C.* are strangers in blood. The fee vests in *B.*, and the executory devise to *C.* is void. *Ware* v. *Cann*. 341

4. *A.* devised a messuage to *B.* for life, and, after other devises, devised all the residue of his real estate to *B.* and his heirs. Afterwards *A.*, having purchased other lands, made this codicil:—"Whereas I did, by my last will and testament, bearing date &c., devise all the real estate *I was then possessed of* in manner therein mentioned, and which will I ratify and

DILAPIDATIONS.

DISCLAIMER.

DISPENSATION.

DISSENTING MINISTER.

DISSOLUTION.

EJECTMENT.

EVIDENCE.

though the parties who had made the payments were alive, and might have been called as witnesses. *Middleton* v. *Melton.* 264

14. A local paving act authorizes commissioners, at a meeting to be called *for that purpose*, to order foot-paths to be raised, &c., and directs that the entries in the commissioners' books may be read in evidence. An entry in the books stating, that such an order was made at a meeting held *by public notice*, does not prove that the meeting was duly holden, so as to legalize the order. It should appear by the entry, or be proved *aliunde*, that notice was given of *the purpose* for which the meeting was called. *Heysham* v. *Forster.* 277

15. Slanderous words, charged as addressed *to* the plaintiff in the second person, are not supported by evidence of words spoken *of* him in the third person, though so spoken in his presence. *Stannard* v. *Harper.* 295

16. The master of a vessel does not incur the penalties imposed by 6 *Geo.* 4, c. 125, s. 58, for refusing to take a pilot on board, unless it distinctly appears in evidence that the pilot at the time of offering his services produced his licence. *Hammond* v. *Blake.* 361

17. The indorsee suing the acceptor of a bill payable to the drawer's order, drawn and indorsed in a fictitious name, may, by comparison of the signatures, shew that the drawing and indorsing are in the same handwriting. *Cooper* v. *Meyer.* 387

18. In an action on a policy of insurance, where the defence is that there has been a material concealment, the *opinion* of underwriters as to the materiality of the matters concealed, may, under certain circumstances, be admissible evidence. *Rickards* v. *Murdock.* 418

19. In an action of trover in the King's Bench by bill, payment to the plaintiff, after the writ and before the declaration, of a sum in satisfaction of the damages and costs, may be given in evidence under the general issue, and will be an answer to the action. *Worswick* v. *Beswick.* 586

20. In an action on a promissory note, made payable on demand, parol evidence of an agreement entered into when it was made, that it shall not be put in suit until a given event happened, is not admissible. *Moseley* v. *Hanford.* 607

21. A partial failure of consideration cannot be given in evidence in answer to an action by the drawer, or his legal representative, against the acceptor of a bill of exchange. *Obbard* v. *Betham.* 632

EXCISE DUTIES.

The breach of mere revenue regulations, which tend to insure the due payment of duties imposed upon the manufacture of an exciseable article, does not render the trade itself illegal, so as to incapacitate the manufacturer from recovering the price of such article, or from suing upon a guarantee given for the due payment thereof. *Brown* v. *Duncan.* 114

EXECUTION OF POWER.

1. Land with the appurtenances was devised to *A.* and his heirs for the use of *B.* for life, without impeachment of waste, with remainders over, with power to *A.*, at the request of the successive cetteux que use, to sell the estate; and to that end *A.* was empowered by deed to revoke the uses in the will, and by the same or any other deed to convey the estate to the purchaser. *A.* sold the estate, ex-

HUSBAND AND WIFE.

1. A debt due from wife *dum sola* cannot be set off against a note given to the wife after marriage, if the husband elect to treat the note as his several property, as where he sues upon it in his own name, or indorses it over to a third person; and it is immaterial that the wife joins in the indorsement. *Borough* v. *Moss.* 296
2. Whether the debt could have been set off in an action brought on the note by the husband and wife, *quære*. *Id.* *ibid.*

HAWKERS AND PEDLARS.

1. The exemption in 50 *G.* 3. c. 41, s. 28, The Hawkers' and Pedlars' Act, in favour of the real worker or maker of goods, &c., or his children, apprentices, and known agents or servants usually residing with him, does not extend to an agent or servant residing in a separate dwelling-house, though wholly employed by such worker or maker. *Rex* v. *Mainwaring.* 36
2. Yeast is a *victual* within the exception in 50 *G.* 3, c. 41, s. 23, the Hawkers' and Pedlars' Act. *Rex* v. *Hodgkinson.* 162
3. A timber-merchant, residing in the town of *A.*, and sending timber from the town of *B.* to the town of *C.* where it is sold by auction, is a hawker requiring a licence under 50 *G.* 3, c. 41, s. 7, although the place of sale were a village. *Rex* v. *Pease.* 507
4. Where a person on one day went the round of a neighbourhood, soliciting and obtaining orders for tea, but having no tea with him, and on a subsequent day went the same round, delivering the parcels of tea previously ordered:—Held, that he was not a person "carrying to sell," or "exposing to sale" tea, within the meaning of 50 *G.* 3, c. 41, so as to be liable to a penalty for trading as a hawker without a licence. *Rex* v. *M'Knight.* 644

ILLEGAL TRADE.

See HAWKERS AND PEDLARS.

The breach of mere revenue regulations, which tend to insure the due payment of duties imposed upon the manufacture of an exciseable article, does not render the trade itself illegal, so as to incapacitate the manufacturer from recovering the price of such article, or from suing upon a guarantee given for the due payment thereof. *Brown* v. *Duncan.* 114

INCLOSURE.

See AWARD, 4.—SETTLEMENT BY ESTATE, 6.

INDICTMENT.

See COSTS, 3.—EVIDENCE, 6—PLEADING, 1.

INFERIOR COURT.

See COSTS, 8.—CERTIORARI.

INFORMATION.

See JUSTICES, 2.

INSOLVENT.

See FRAUDULENT PREFERENCE.—WARRANT OF ATTORNEY.

1. A plaintiff in execution for costs exceeding 20*l.*, is not entitled to his discharge under 48 *G.* 3, c. 123, after having lain in prison twelve months. *Tinmouth* v. *Taylor.* 44
2. *Semble*, that the statute does not apply to plaintiffs in any case. *Id.* *ibid.*
3. The undertaking of the execution creditor to pay 3*s.* 6*d.* a week to the debtor under the Lords' Act, is satisfied by payment to the turnkey. *Gainsford* v. *Marshall.* 485

4. The assignees of an insolvent cannot recover from a person with whom the insolvent has deposited the title deeds of an estate, as a security for a debt, the rents of the estate received by such person subsequently to the assignment. *Garry* v. *Sharratt.* 609

INSURANCE.

See POLICY OF INSURANCE.

JOINDER OF PARTIES.

See COSTS, 6, 7.—HUSBAND AND WIFE.—SET-OFF, 1, 2.

1. An attorney carrying on business under the firm of "K. and Son," his son not being in fact his partner, may sue alone for the amount of his bill for professional business done. *Kell* v. *Nainby.* 76
2. A covenant with the part-owners of a ship, and their several and respective executors, &c., to pay money, to accrue for the hire of the ship, for freight of goods, and for compensation for the use of the ship's tackle, &c., to the covenantees, their and every of their several and respective executors, &c., at a certain banking-house, in such parts and proportions as were set against their several and respective names, is a several covenant, and cannot be sued upon by the covenantees jointly. *Servante* v. *James.* 299
3. Where *B.* commits a trespass on the land of *A.*, by the direction and for the benefit of *C.*, and *A.* sues *B.* alone, the Court will not order *C.* to pay *A.*'s costs. *Berkeley* v. *Demery.* 442

JOINT TENANTS.

See COPYHOLD, 6.

JUDGE'S CERTIFICATE.

See COSTS, 10.

JUSTICES.

See COMMITMENT.—COUNTY RATE, 2.—FRIENDLY SOCIETIES.—SESSIONS.—SETTLEMENT.

1. A warrant of commitment for re-examination for an unreasonable time, as for fourteen days, is wholly void; and *trespass* lies against the committing magistrate, though he acted without any indirect or improper motive. *Davis* v. *Capper.* 53
2. A conviction before magistrates, upon an information under the game laws, is a judicial proceeding, at which all the king's subjects for whom there is room, and against whom there rests no special ground for exclusion, have a right to be present. *Daubney* v. *Cooper.* 314
3. *Quære*—What shall be a wilful detainer of the certificate of registry of a ship, authorizing the interference of a magistrate under 6 *G.* 4, c. 41, s. 25. *Bowen* v. *Fox.* 4

LANDLORD AND TENANT.

See EJECTMENT.—LEASE.—SETTLEMENT BY ESTATE, 5.

1. Where in an action by reversioner against the tenant of a house, for opening a door in a wall, without the consent of the plaintiff, and thereby damaging the house, and prejudicing the plaintiff's reversionary interest, the opening of the door is proved, and all actual damage to the house is disproved, the jury should be directed to inquire, whether the reversionary interest of the plaintiff has, or has not been injured. A nominal verdict for the plaintiff, without such direction or inquiry, on the ground that the defendant had no right to make the alteration, was set aside. *Young* v. *Spencer.* 47
2. *A.*, the owner of a house which, in consideration of a premium paid

to the lessor, and a covenant to repair and finish, had been demised to *B.* at a rent amounting to less than the annual value, redeems the land tax thereon under 38 *G.* 3, c. 5. *A.* is entitled to an annual payment from *B.* in respect of the difference between the rent and the annual value, viz. an annual payment bearing the same proportion to the whole land tax redeemed, which the difference between the rent and the annual value bears to the annual value. *Ward* v. *Const.* 402

LAND-TAX.

See LANDLORD AND TENANT, 2.

LEASE.

See EVIDENCE, 1.—LANDLORD AND TENANT, 2.—MUNIMENT CHEST.

1. A demise of the glebe by the incumbent of a benefice with cure of souls, to secure an annuity, is void by 57 *G.* 3, c. 99, reviving 13 *Eliz.* c. 20. *Shaw* v. *Pritchard.* 180
2. *A.* agrees to execute to *B.* an effectual assignment of the two leases of a house and shop for £4250, "as he holds the same for a term of 28 years," and *B.* agrees to accept "a proper assignment of the leases as above described, without requiring the lessor's title:" Held, that *B.* was bound to take an assignment of the two consecutive leases, though the second was void, being executed under a power which had not been pursued. *Spratt* v. *Jeffery.* 188

LIBEL.

Whether matter written or printed by *A.* concerning *B.* is libellous, depends not upon the intention of *A.* to injure *B.*, but upon the tendency of the publication to produce the injurious effect. *Fisher* v. *Clement.* 730

LIEN.

See BANKRUPT, 7.—INSOLVENT, 4.—PLEDGE BY FACTOR.—SHIP'S REGISTRY, 2.—TROVER.—WITNESS.

LIMITATION OF ACTION.

1. A dock act authorised a company to make and maintain docks, and to appoint a dock-master, who should have power to direct the mooring, unmooring, moving and removing of all vessels into or in the docks, and should have control over the space of 100 yards from the entrance into the docks, so far as related to the transporting of vessels in and out; the company to be sued in the name of their treasurer; and every action brought against any person for *any thing done in pursuance of the act*, to be commenced within six calendar months after the fact committed. In an action brought against the treasurer for damage done to a vessel by means of improper directions given by the dock-master in transporting her into the docks:—Held, that giving such directions was a thing done in pursuance of the act, and that the action should have been commenced within six calendar months after those directions were given. *Smith* v. *Shaw.* 225
2. *A.* having lent *B.* a sum of money, agreed to continue the loan for one year, from September, 1826, to September, 1827, on condition that *B.* would pay a bonus in the first instance, and legal interest upon the sum lent half-yearly. *B.* paid the bonus in January, 1827, and legal interest upon the money lent half-yearly, in April and October, 1827. In June, 1828, an action was commenced against *A.*

for usury:—Held, that the action was not commenced within one year after any offence committed, for that the only offence committed was complete in April, 1827, when the first payment of interest was made, and that the bonus could not be apportioned to the second payment of interest, so as to render that usurious. *Wood* v. *Gamwood.* 598

LIMITATIONS, STATUTE OF.

See PROMISSORY NOTE, 2.

LORDS' ACT.

The undertaking of the execution creditor to pay 3*s.* 6*d.* a week to the debtor, under the Lords' Act, is satisfied by payment to the turnkey. *Gainsford* v. *Marshall.* 45

MALICE.

See COSTS, 1, 2.

MALICIOUS ARREST.

See COSTS, 1, 2.

MANDAMUS.

See COPYHOLDS, 1, 2, 6.—NOTARY PUBLIC, 2.

Where a preacher at an endowed meeting-house has such an interest in his office and its emoluments as will entitle him to a mandamus if disturbed in the use of the pulpit, he has not such a legal interest in the endowment, as will entitle him to retain possession against the trustees of such endowment. *Doe* d. *Evans* v. *Jones.* 752

MANOR.

See COPYHOLD.—SETTLEMENT BY ESTATE, 5.

MASTER AND SERVANT.

See SETTLEMENT BY ESTATE, 5.—SETTLEMENT BY HIRING AND SERVICE.

MONEY HAD AND RECEIVED.

See SHERIFF.

Rent paid by *A.* to *B.*, claiming as devisee, the amount of which *A.* is afterwards compelled to pay to the heir, may be recovered back by *A.* as money had and received to his use, *B.* setting up no title to the lands when the action is brought, or at the trial. *Newsome* v. *Graham.* 64

MUNIMENT CHEST.

The muniment chest of the lessor and his assigns, is the proper custody for an expired lease. *Plaxton* v. *Dare.* 1

MUTUAL CREDITS.

See BANKRUPT, 2.—SET-OFF.

NEW TRIAL.

A plaintiff nonsuited for want of formal proof, will not be allowed a new trial upon payment of costs. *Swayne* v. *Ingilby.* 125

NON-JOINDER.

See JOINDER OF PARTIES.

NONSUIT.

See ABATEMENT OF SUIT.—NEW TRIAL.—PRACTICE, 2, 3, 4.

NOTARY PUBLIC.

1. A person who was bound apprentice to a notary for seven years, and during the whole of that time acted as banker's clerk till five

PART-OWNER.

PATENTS.

PAYMENT.

PILOT.

PLEADING.

PLEDGE BY FACTOR.

POACHING.

See PLEADING, 1.

POLICY OF INSURANCE.

See WITNESS.

3. By the custom of *Lloyd's*, premiums of insurance are matters of account between the underwriter and the broker, and between the broker and the assured, without any privity between the assured and the underwriter. The broker has therefore a claim upon the assured for the amount of the premium as soon as the policy is effected, whether he has paid the underwriter or not,—and whether the underwriter has, by the policy, confirmed the premium to be paid; or has taken the covenant of the broker to pay it. *Power* v. *Butcher*. 327

4. *A.*, at Sydney, ships goods to *B.*, at London, by the ship *C.*, and by the next ship writes to him, directing him, if the letter arrives before the *C.*, to wait thirty days, in order to give every chance for her arrival, and then to insure the goods. *B.* receives the letter, and after waiting thirty-six days, insures the goods, telling the underwriter when the *C.* sailed and where the letter was written, but not telling him when he received the letter. The *C.* never arrives. This is a material concealment, and avoids the policy. *Rickards* v. *Murdock*. 418

5. In an action on the policy, under such circumstances, the *opinion* of underwriters, as to the materiality of the matter concealed, was held to be admissible evidence. *Id.* *ibid.*

6. Policy of insurance on goods by ship "at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port of discharge in Europe, with leave to touch, stay, and trade at all or any ports and places whatsoever and wheresoever in the East Indies, Persia, or elsewhere, &c., beginning the adventure upon the goods from the loading thereof on board the ship as above." The ship took in some goods at Batavia, then went to Sourabaya, a port in the East Indies, but not in the direct course from Batavia to Europe, and took in other goods, then returned to Batavia, and afterwards sailed from thence for Europe, and was lost by the perils of the sea:—Held, that the going to Sourabaya was no deviation, and that the goods taken in there were protected by the policy. *Hunter* v. *Leathley*. 522

7. Policy of insurance on a ship for a year, with a stipulation for a proportionate return of premium, "for every uncommenced month, if the ship should be sold or laid up." The ship was laid up for several months during the year, but was afterwards employed within the year:—Held, that the words "laid up" meant a permanent laying up, such as would put a final end to the policy, and therefore that the assured was not within the stipulation, nor entitled to any returns of premium. *Hunter* v. *Wright*. 611

POOR.

See CHURCH RATE, 2—PARISH LANDS—SETTLEMENT.

POOR RATE.

See COUNTY RATE.

By the Oxford Canal Act, the proprietors were authorized to take a mileage tonnage for coals and other goods, excepting coals for two miles, in respect of which the proprietors of the Coventry Canal were authorized to take all dues payable under that act, for all coals carried from the Oxford Canal within those two miles. By the same act, the proprietors of the Oxford Canal were authorized to take all dues payable under the Coventry Canal Act, for all goods, except coals, carried upon the Ox-

ford Canal, and afterwards upon the Coventry Canal, within three miles and a half of the point of junction of the two canals. That point of junction was in parish F., which contained one mile nine hundred and sixty-three yards of the Oxford Canal, part of the two miles before mentioned, and two miles and a quarter of the Coventry Canal, part of the three miles and a half before mentioned.

By the Grand Junction Canal Act, reciting that that canal might be injurious to the proprietors of the Oxford Canal, and that compensation should be made to them for such injury, they were authorized to take *2s. 9d.* per ton for all coals passing from the Oxford Canal into the Grand Junction Canal, without regard to the distance they might pass on the Oxford Canal; and *4s. 4d.* per ton for all other goods passing from any canal into the Oxford Canal, and from thence into the Grand Junction Canal, or vice versâ, without regard to the distance they might pass on the Oxford Canal.

Held, that the proprietors of the Oxford Canal were ratable in parish F. for *all* the dues received by them, in the proportion in which they were severally earned in that parish, but that, in fixing the rate, *all* the expenses incurred in maintaining the part of the canal situate in that parish must be first deducted from the total amount of dues received. *Rex* v. *Oxford Canal Company.* 100

POWER.

See EXECUTION OF POWER, 1.

POWER OF ATTORNEY.

A power of attorney given by a debtor to a creditor, authorizing him to sell an estate, and to apply the proceeds in liquidation of his debt, is an authority coupled with an interest, and cannot be revoked. *Gaussen* v. *Morton.* 613

PRACTICE.

See ABATEMENT OF SUIT—AMENDMENT—AWARD—COSTS, 7—EVIDENCE, 18—PLEADING, 3.

1. Where the sheriff neglects his duty, the Court would not (even before the Interpleader Act) enlarge the time for returning the writ, although the judgment creditor and the assignees of the defendant refuse to indemnify. *Colly* v. *Hardy.* 123
2. A plaintiff nonsuited for want of formal proof, will not be relieved upon payment of costs. *Swayne* v. *Ingilby.* 125
3. A court of error will not inquire into the propriety of a rule made by one of the superior courts, for amending the declaration; or of a rule for setting aside a rule to plead several matters, and for striking out pleas filed in accordance with such rule; or of a rule for setting aside a nonsuit, although the nonsuit has been obtained in a form of action (quare impedit) in which a nonsuit is made peremptory by statute. *Bishop of Exeter* v. *Gully, in error.* 457
4. The Court of Chancery will not award a writ of diminution, requiring one of the superior courts —which has given a judgment upon which error is brought—to certify the residue of the record and process, upon a suggestion, supported by affidavit, that such Court has not returned an original record existing in the cause, for which the record returned has been substituted in such Court by amendments ordered to be made by rule of such Court. The proper mode of objecting to such amendments is by tendering a bill of exceptions. *Id.* 499

5. Where the plaintiff, in a qui tam action for usury, sued out his writ in September, 1828, delivered his declaration in Trinity term, 1829, took the record down for trial at the summer assizes, 1829, and then withdrew the record; the Court refused to allow him to amend his declaration. *Wood* v. *Grimwood.* 584

PRINCIPAL AND AGENT.

See AGENT—NOTICE TO QUIT, 1, 2—PLEDGE BY FACTOR—REVOCABLE AUTHORITY.

PRINCIPAL AND SURETY.

See EVIDENCE, 13.

1. *A.*, principal, and *B.*, surety, gave their promissory note to *C.*. *C.* sues *A.*, and takes a cognovit payable by instalments, the first instalment to be paid on the day before that on which *C.* might have signed final judgment in the action, if no cognovit had been given, with power to issue execution for the whole debt in case of default. *A.* makes default at the day:—Held, that *B.* is not discharged. *Price* v. *Edmunds.* 287
2. Whether *B.* would have been discharged if the first instalment had been duly paid, and the further instalments had thereby stood deferred to a day subsequent to that on which final judgment could have been signed, if no cognovit had been given, *quære*. *Id. ibid.*

PROCEDENDO.

See CERTIORARI.

PROCESS.

Under particular circumstances, one man may be justified in laying hands upon another, for the purpose of serving him with process. *Harrison* v. *Hodgson.* 392

PROMISSORY NOTE.

See HUSBAND AND WIFE—PARTNERS, 3—PRINCIPAL AND SURETY—SET-OFF.

1. A memorandum at the foot of a promissory note, indicating a particular place of payment, forms no part of the contract, though shewn to be contemporaneous with the note itself. *Williams* v. *Waring.* 9
2. *A.* gave his bankers, as a security for advances, a note by which he and *B.* jointly and severally promised to pay on demand, to the bankers or order, 300*l.*, with interest. The bankers credited *A.* with the amount of the note, and debited him yearly with interest. Upon a change in the firm of the bankers, the note, unindorsed, was, with *A.*'s account, transferred to the new firm. At one time *A.* had a balance in the bankers' hands exceeding the amount of the note. *A.* paid interest on the note yearly to the new as well as the old firm.

   Held, first, that the note, being a continuing security, might be enforced, notwithstanding the change in the banking firm.

   Secondly, that the note, not having been indorsed, the original payees, or the survivors of them, were the proper persons to sue upon it.

   Thirdly, that the note was not discharged by *A.*'s having at one time in the bankers' hands a balance exceeding its amount.

   Fourthly, that payment, within six years, of interest on the note by *A.*, took the case out of the Statute of Limitations as to *B.* *Pease* v. *Hirst.* 88
3. In an action on a promissory note, a declaration made by the plaintiff before he became the holder, is evidence to invalidate the note. *Williams* v. ——. 121
4. In an action on a promissory note made payable on demand, parol

evidence of an agreement entered into when it was made, that it should not be put in suit until a given event happened, is not admissible. *Moseley* v. *Hanford.* 607

QUARE IMPEDIT.

See PRACTICE, 3, 4.

1. A presentation by *A.* is a sufficient possession to support a quare impedit by *B.*, a party claiming under the youngest daughter and co-heir of *A.*, after severance amongst the coparceners, by reason of their disagreeing in presentation. *Bishop of Exeter* v. *Gully.* 457
2. In quare impedit by *B.*, a party claiming under the fourth daughter and co-heir of *A.*, the declaration alleges, that after severance by disagreement, the eldest daughter presented in the first turn, and that unknown persons successively presented *as in* the turns of the second and third coparceners:—Held, that these presentations must be taken to have been *by right*, and not *by usurpation*; but that if made by usurpation, they would not destroy the effect of the presentation by the common ancestor, as sufficient to support the *possessory* right of all the coparceners. *Id.* *ibid.*
3. A conveyance of the property of the youngest of four coparceners, when the church is full upon the presentation of the eldest, expressed to be made "in consideration of 20*s.* and of faithful service done to the grantor, as also for divers good and valuable causes and considerations him thereunto moving," is not necessarily fraudulent as against a subsequent purchaser for value. *Id.* *ibid.*

RATE.

See CHURCH RATE—COUNTY RATE—POOR RATE.

RECOGNIZANCE.

See CERTIORARI—SESSIONS—SHERIFF.

RECORD OF ACQUITTAL.

See EVIDENCE, 6.

Semble, that a party indicted and acquitted, is entitled, as of right, to a copy of the record of acquittal. *Browne* v. *Cumming.* 118

REPEALED STATUTE.

Where a repealing statute is repealed, the first statute is, after the day on which the third statute takes effect, revived ab initio, and not merely as from that day. *Phillips* v. *Hopwood.* 15

REVERSIONER.

See LANDLORD AND TENANT, 1.

REVOCABLE AUTHORITY.

A power of attorney given by a debtor to a creditor, authorizing him to sell an estate, and to apply the proceeds in liquidation of his debt, is an authority coupled with an interest, and cannot be revoked. *Gaussen* v. *Morton.* 613

RIGHT OF COMMON.

See AWARD, 4.

SCRIVENERS' COMPANY.

See NOTARY PUBLIC.

SESSIONS.

See CHURCH RATE—COUNTY RATE—POOR RATE—SETTLEMENT.

Where, upon a recognizance forfeited at quarter sessions, the sheriff has levied part of the penalty, and has the defendant in execution for the residue, the sessions have jurisdic-

tion over the whole recognizance. *Harper* v. *Hayton.* 305

SET-OFF.

See BANKRUPT, 2.

1. A debt due from wife dum sola, cannot be set off against a note given to the wife after marriage, if the husband elect to treat the note as his several property; as where he sues upon it in his own name, or indorses it over to a third person; and it is immaterial that the wife joins in the indorsement. *Borough* v. *Moss.* 296
2. Whether the debt could have been set off in an action brought on the note by the husband and wife, *quære. Id.* *ibid.*
3. The indorsee of an over-due bill or note, is affected by all equities attaching to the bill or note, but not by a *set-off*, which would have been available against the indorser. *Id.* *ibid.*

SETTLEMENT.

By Acknowledgment.

1. A parish certificate, produced in an appeal, bore date in April, 1748, and purported to be signed by two churchwardens and two overseers. It appeared by the parish books, that in May, 1747, five overseers had been appointed, two of whom had signed the certificate. By an indenture of parish apprenticeship, dated in October, 1747, it appeared that the same five persons were at that time overseers, and that four persons were at the same time churchwardens, two of whom had signed the certificate; and, by the parish books, in July, 1748, that five overseers were again appointed, and that four churchwardens had been regularly chosen from 1683 to 1829. By the visitation books for 1746, it appeared that four churchwardens were then sworn in; those for 1747 were lost; but by those for 1748, it appeared that in September, in that year, four churchwardens were again sworn in, but that in about a dozen instances between 1683 and 1829, less than four churchwardens had been sworn in:—Held, that the sessions were not bound to presume, even for the purpose of giving effect to so ancient a document, either that there had been a new and valid appointment of overseers between October, 1747, and April, 1748, the date of the certificate; or that at that date less than four churchwardens were sworn in: and that they were, therefore, right in rejecting the certificate as invalid. *Rex* v. *Upton Gray.* 688

By Apprenticeship.

2. An indenture of apprenticeship, to which parish officers are parties, is valid if allowed by two justices, under their *hands only*, though expense be incurred, (but not clandestinely,) by the parish funds, under 56 *Geo.* 3, c. 139, ss. 1 to 10. *Rex* v. *St. Paul, Exeter.* 94
3. Sect. 11 of that act, which requires an allowance by two justices, under their hands *and seals*, applies only to cases where expense is incurred by the parish funds, and the parish officers are not parties to the indenture. *Id.* *ibid.*

By Birth.

4. A single woman, settled in A., was removed from B. to C. The order of removal was quashed, on appeal, but she had been previously delivered of a bastard child in C.:—Held, that the child was not settled in A. *Rex* v. *Martlesham.* 82

By Estate.

5. An estate in remainder, though vested, will not confer a settlement. *Rex* v. *Willoughby-with-Sloothby.* 32

6. A burgess receiving, by the allotment of the burgesses, a portion of the rent of lands held by the borough, does not thereby gain a settlement by estate. *Rex* v. *Belford.* 174
7. A gift of land by parol confers only an estate at will, and an undisturbed possession for fifteen years confers no settlement. *Rex* v. *Chew Magna.* 635
8. Residence, by a tenant at will, upon an estate of less value than 10*l.* a year, confers no settlement. *Id.* *ibid.*
9. A pauper was hired as shepherd by the tenantry farmers of a manor, to keep the tenantry flock, at 14*s.* a week, and was to have a piece of land, called the Shepherd's Croft, which was to make up money as good as 16*s.* a week; and he served a year under that hiring. By agreement of 1799, between the lord of the manor, his lessee of the manor, and the leaseholders and copyholders of the manor, arbitrators were appointed for dividing and allotting the open fields and downs within the manor, among the lessee and the leaseholders and copyholders of the manor, in lieu of the lands they had in the manor. The arbitrators allotted to the lessee of the manor, in trust for the shepherd of the tenantry flock, in lieu of lands in the manor held by custom by the shepherd, the piece of land called the Shepherd's Croft, which the pauper had when he was hired as shepherd, and he occupied part, and let off part to a tenant, during all the time he served as shepherd:—Held, that the pauper took the land in his character of servant, in lieu of wages, and therefore, that he gained no settlement by estate. *Rex* v. *South Newton.* 715
10. A pauper settled in parish A., in 1800 inclosed a piece of waste land from a common in parish B., and held and cultivated it till 1827, when he sold and conveyed it to a purchaser. From 1800 to 1825, he resided out of parish B., but in 1825 he removed into that parish, and in 1826 built a hut on the land, in which he lived a year and a half. In 1806, 1811, and 1817, the parishioners of B. perambulated that parish, for the purpose of marking their boundaries, &c., on which occasions they pulled up a portion of the fence of the land so inclosed by the pauper, dug up part of the bank, and rode through the inclosure. In 1820 or 1822, a similar perambulation was made, and similar acts done, by direction of the lord of the manor. No acknowledgment was ever paid to the lord of the manor for the land:—Held, that there was an adverse possession for twenty years, and that the pauper gained a settlement by estate in parish B. *Rex* v. *Wooburn.* 723

By Hiring and Service.

11. Where, upon a yearly hiring from the 13th of May, the following 13th of May is excluded from the service by a dissolution of the contract, no settlement is gained, although, by reason of its being leap-year, the service continue 365 days. *Rex* v. *Roxley.* 40
12. What shall be a dissolution of the contract, and what merely a dispensation with the service, is a question of fact for the Court of Quarter Sessions. *Id.* *ibid.*
13. A master having said to a pauper, he thought he would suit him, the pauper said, his mother would like to make him an apprentice. The master said, he would not take him apprentice, because if he did he should offend the farmers; he would take him on an agreement for four years. A week afterwards it was agreed between the pau-

per's father-in-law and the master, that the pauper should serve him for four years, to learn his trade, to have meat, drink, washing and lodging, the whole time, and 2*s.* 6*d.* a week for the last two years :— Held, that the principal object of the parties being, that the pauper should learn the trade of the master, this was a defective contract of apprenticeship, and not a contract of hiring and service. *Rex* v. *Edingale.* 648

14. A pauper hired himself for a year, at 5*l.* wages and 5*s.* earnest, to his aunt, who occupied six acres of land, and kept two cows; when his aunt had no work for him, he was to work for any body else for his own benefit. This is not a hiring for a year, but an exceptive hiring, and service under it confers no settlement. *Rex* v. *South Killingholme.* 683

15. A pauper was hired as shepherd for eleven months. At the end of that time he was hired for one month. In the course of that month he was hired "to go on again upon the same terms." He continued in the service two years uninterruptedly :—Held, that the last was a general hiring, under which the pauper gained a settlement. *Rex* v. *South Newton.* 715

By Holding an Office.

16. The office of crier and bellman for a city is a public annual office within the meaning of the statute 3 & 4 *W. & M.* c. 11, s. 6, execution of which for a year, with forty days' residence within the city, will confer a settlement. *Rex* v. *St. Nicholas, Hereford.* 676

17. And if the city contains several parishes, the party executing the office will be settled in that parish in which he has resided during the last forty days of his execution of the office. *Id.* *ibid.*

By Parentage.

18. A single woman, settled in A., was removed from B. to C. The order of removal was quashed on appeal, but she had been previously delivered of a bastard child in C.— Held, that the child was not settled in A. *Rex* v. *Martlesham.* 82

By Renting a Tenement.

19. Under 6 *Geo.* 4, c. 57, and before 1 *W.* 4, c. 18, a settlement was gained by renting a dwelling-house and land at a rent exceeding 10*l.*, actually paid, provided the whole tenement were occupied under the renting, although the land were not occupied by the renter himself, but by a sub-lessee of the land. *Rex* v. *Great Bentley.* 559

20. A person renting the tolls, and residing in the toll-house, of a navigation, is within the prohibition in 54 *Geo.* 3, c. 179, s. 5, and cannot thereby gain a settlement, although he uses the house as a public-house, and it is worth much more than 10*l.* a year, to be let for that purpose. *Rex* v. *St. Andrew the Less, Cambridge.* 639

21. A pauper was hired in 1800 as labourer, at thirty guineas a year, to have a house, two gardens, and a rood of potatoes. After the bargain was made, his master said he might have the milk of a cow, and shortly after going into the service he had the milk of a cow, which was fed on his master's close during that part of the year when cattle are pasture-fed. The value of the house, gardens, and rood of potatoes was under 10*l.* a year, but with the keep of the cow upon the land was above that sum :— Held, that the pauper did not acquire a settlement by the occupation of a tenement of the yearly value of 10*l.*, for it was no part of the contract that he should have the milk of a cow, and even if it had been, it was no part of the

STOPPAGE IN TRANSITU.

After stoppage in transitu the vendee ceases to have an insurable interest. *Clay* v. *Harrison.* 17

SUBPŒNA DUCES TECUM.

See WITNESS, 1.

SURETY.

See PRINCIPAL AND SURETY.

TENANT AT WILL.

See NOTICE TO QUIT, 3, 4—SETTLEMENT BY ESTATE, 3, 4.

Where a preacher at an endowed

meeting-house has such an interest in his office and its emoluments as will entitle him to a mandamus, if disturbed in the use of the pulpit, he has not such a legal interest in the endowment as will entitle him to retain possession against the trustees of such endowment. *Doe* d. *Evans* v. *Jones*. 752

TOLLS.

See TOLL-THOROUGH.

A person renting the tolls, and residing in the toll-house, of a navigation, is within the prohibition in 54 *Geo.* 3, c. 179, s. 5, and cannot thereby gain a settlement. *Rex* v. *St. Andrew the Less, Cambridge*. 639

TOLL-THOROUGH.

Liability to repair *part* of the streets of a town, is not a sufficient consideration for toll-thorough extending over the *whole* town. *Brett* v. *Beales*. 433

TRADING.

See BANKRUPT, 5, 6—HAWKERS AND PEDLARS—ILLEGAL TRADE.

TRESPASS.

See EVIDENCE, 7—JUSTICES, 3—SHIP'S REGISTRY—TROVER.

TROVER.

See BANKRUPT, 7—CERTIORARI, 1—EVIDENCE, 18.

Trover will not lie against a party with whom the certificate of registry of a ship is deposited as a security for advances, upon a refusal to deliver up such certificate without payment. *Bowen* v. *Fox*. 4

TRUSTEES.

See MANDAMUS—NOTICE TO QUIT, 3, 4—TENANT AT WILL.

USURY.

See AMENDMENT—BANKRUPT, 7—LIMITATION OF ACTION, 2.

VENDOR AND VENDEE.

See ASSUMPSIT—PLEADING, 2.

1. After stoppage in transitu, the vendee ceases to have an insurable interest. *Clay* v. *Harrison*. 17
2. Plaintiffs, merchants at Liverpool, circulated catalogues of goods to be sold by auction, containing this condition:—"Payment on delivery of bills of parcels, by good bills on London, to the satisfaction of the sellers, not exceeding three months' date, to be made equal to cash in four months." *L.* and *W.*, brokers at Liverpool, sent a catalogue to defendants, merchants in London, who directed *L.* and *W.* to buy certain lots, which they bought accordingly. Before the sale began the auctioneer stated that "payment by known buyers" was to be "the usual credit of two and two months." *L.* and *W.*, being known buyers, obtained the goods without giving bills, and forwarded them to defendants in London, with an invoice, stating that "payment" was to be "equal four months cash," and drew on defendants for the amount by a bill at four months from the day of the sale, which defendants accepted and paid when due. Within two months after the sale *L.* and *W.* failed, never having given plaintiffs bills for the price of the goods, whereupon plaintiffs sued defendants for the price:—Held, that plaintiffs could not recover, as they had by their own catalogue led defendants to believe that *L.* and *W.* had given them bills for the goods, and had thereby induced defendants to accept and pay the bill drawn on them by *L.* and *W.* *Horsfall* v. *Fauntleroy*. 653

END OF VOL. V.

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